CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 94

MEMPHIS NATURAL GAS COMPANY, PETITIONER,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PETITION FOR CERTIORARI FILED MAY 17, 1947.

CERTIORARI GRANTED JUNE 16, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

MEMPHIS NATURAL GAS COMPANY, PETITIONER,

vs.

A. H. STONE, CHAIRMAN, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 11664

MEMPHIS NATURAL GAS CO.

vs.

STATE TAX COMMISSION

First Day

PLEAS AND PROCEEDINGS—May 6, 1946

Pleas and Proceedings had and done at a regular term of the Circuit Court of the First Judicial District of Hinds County, Mississippi begun and held in the City of Jackson on the First Monday of May, 1946, being the Sixth day of May, A. D. 1946.

Present: Honorable H. B. Gillespie, Judge of the Seventh Circuit Court District of Mississippi and presiding Judge of this Court.

L. M. Gordon, Sheriff; H. T. Ashford, Jr., Circuit Clerk; E. A. Knight, Court Reporter.

M. B. 27—Page 24

[fol. 3] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

[Title omitted]

To the Honorable Judge of the Circuit Court of Hinds County, Mississippi:

APPEAL OF MEMPHIS NATURAL GAS COMPANY FOR ASSUMPTION OF JURISDICTION IN THE MATTER AND DETERMINATION OF THE FRANCHISE TAX LIABILITY OF THE MEMPHIS NATURAL GAS COMPANY—October 30, 1945

Pursuant to Paragraph 9328 of the 1942 Mississippi Code, the Memphis Natural Gas Company, a Delaware corporation with its general offices in Memphis, Tennessee,

appeals to this court for assumption by it of jurisdiction in the matter and determination of the franchise tax properly due. It is the contention of the Memphis Natural Gas Company that it is not liable for any franchise taxes to the State of Mississippi. The State Tax Commission on October 5, 1945, entered a final order adjudging that the Memphis Natural Gas Company is liable for franchise taxes as follows:

> For the year 1942 in the sum of $3,432.00 with statutory interest thereon from the due date;
> For the year 1943 in the sum of $3,466.50 with statutory interest thereon from due date;
> For the year 1944 in the sum of $3,415.50 with statutory interest thereon from the due date.

[fol. 4] A certified copy of said final order of October 5, 1945 is attached to this petition as Exhibit 1.

As shown by said order, the Memphis Natural Gas Company filed with the State Tax Commission on October 1, 1945 its petition for a review of the question of appellant's franchise tax liability to the State of Mississippi. Said petition so filed with the State Tax Commission sets forth the various reasons why the Memphis Natural Gas Company contends it is not liable for franchise taxes. A copy of said petition is attached hereto as Exhibit 2, and is made a part hereof by reference.

During the years in question petitioner has been engaged in Mississippi solely in interstate commerce and has not been domesticated or qualified as a foreign corporation with the right to do intrastate business, has had no agent for service of process during the years in question, and has not in any of said years maintained any offices in Mississippi and has had no employees or representatives therein other than those necessary to maintain the pipe line and related facilities, and has in no way sought the privilege of doing intrastate business and has not at any time engaged in intrastate business.

Petitioner's sole activity and business in Mississippi has been the maintenance and operation of that part of its interstate pipe line system within Mississippi. Said pipe line system originates at the Monroe Gas Field in the State of Louisiana, extends through the southeast corner of the State of Arkansas, crosses the Mississippi River at

Greenville, Mississippi and continues north through the State of Mississippi into the State of Tennessee at a point south of the corporate limits of the City of Memphis and thence to Jackson, Tennessee, which is the eastern terminus of the same.

Petitioner transports through this pipe line system natural gas for sale and delivery at wholesale to the Mississippi Power & Light Company, its sole customer in the [fol. 5] State of Mississippi, under a contract made without Mississippi. The Mississippi Power & Light Company takes the natural gas into its possession at various delivery points on and along appellant's pipe line system. The Mississippi Power & Light Company then distributes at retail the natural gas to its various customers. Appellant has no connection with or interest in the retailing and distribution thereof by the Mississippi Power & Light Company. All deliveries and sales by appellant to the Mississippi Power & Light Company are at wholesale. This business so conducted by appellant in Mississippi has repeatedly been held by the Supreme Court of the United States to be interstate commerce.

During the years in question appellant has paid to the State of Mississippi and the political subdicisions thereof all ad valorem taxes assessed against its properties within Mississippi.

For the numerous reasons set forth in Exhibit 2 to this petition it is the insistence of appellant that it is not liable for any franchise taxes, and the imposition of such a tax is an illegal exaction for the several reasons set forth in Exhibit 2 hereof, and particularly because the exaction of franchise taxes from appellant violates the Commerce Clause of the Federal Constitution and also other clauses of the Federal Constitution as more fully set forth in Exhibit 2 hereof.

In praying this appeal from the order of the State Tax Commission appellant relies upon each and every reason appearing in Exhibit 2 hereof to support appellant's insistence of nonliability for the taxes.

Premises considered, the Memphis Natural Gas Company, appellant, petitions this court for assumption of jurisdiction in the matter and determination of the franchise taxes properly due and as provided for in Paragraph 9328 of the 1942 Mississippi Code and the other statutory provisions relating to appeals of this nature.

[fol. 6] Appellant further petitions this court that an order be entered requiring the Secretary of the State Tax Commission, over his official seal and signature, to certify a transcript of the State Tax Commission record in this cause to the Clerk of this Court, and that the franchise tax liability of petitioner be revieoed by this court de novo.

At Memphis, Tennessee, this 30th day of October, 1945.

Memphis Natural Gas Company, By: H. L. Mann, President.

Edward P. Russell, Canada, Russell & Turner, 2910 Sterick Building, Memphis, Tennessee; B. L. Tighe, Jr., Standard Life Building, Jackson, Mississippi, Counsel for Memphis Natural Gas Company.

Duly sworn to by H. L. Mann. Jurat omitted in printing.

[fol. 7] Before the State Tax Commission of Mississippi

Order—October 5, 1945

The above styled cause came on for final consideration on this the 5th day of October, 1945, pursuant to orders adopted on August 24, 1945, August 30, 1945 and September 21, 1945.

It appears that in accord with the Order of this Commission adopted September 21, 1945, the said Memphis Natural Gas Company filed its petition for a review of the Franchise Tax assessed against it by the Commissioner, said petition being filed October 1, 1945.

It appears that the said Memphis Natural Gas Company has perfected its record showing its appeal from the decision of the Commissioner to the Commission, and the Commission having heretofore considered the matter and the evidence and argument of counsel and reached the conclusion that the said Company was liable for Franchise Tax for the said years in the amount as heretofore determined.

It, Is, Therefore Ordered And Adjudged, That the petition of the said Memphis Natural Gas Company for revision of Franchise Tax assessed against it by the Commissioner for the years 1942, 1943 and 1944 be and is hereby denied and over-ruled, and the decision of the Commissioner be

and is hereby sustained as to the liability of the said company for said Franchise Tax; and that the said Memphis Natural Gas Company be and is hereby adjudged to be liable for Franchise Tax for the year 1942 in the sum of [fol. 8] $3,432.00, for the year 1943 in the sum of $3,466.50, and for the year 1944 in the sum of $3,415.50, with statutory interest thereon from the respective due dates; and the decision of the Commissioner with respect to the liability of the said Company is hereby sustained, approved and confirmed; and the said Company is hereby assessed with the amounts herein set forth for the respective years.

Ordered and adjudged this the 5th day of October, 1945.

Secretary's Certificate to foregoing paper omitted in printing.

[fol. 9] BEFORE THE STATE TAX COMMISSION OF MISSISSIPPI

PETITION OF MEMPHIS NATURAL GAS COMPANY TO A. H. STONE, CHAIRMAN, STATE TAX COMMISSION AS FRANCHISE TAX COMMISSIONER, STATE OF MISSISSIPPI, FOR DETERMINATION OF FRANCHISE TAX LIABILITY OF MEMPHIS NATURAL GAS COMPANY FOR YEARS 1942, -43, -44, AND -45

Memphis Natural Gas Company, a Delaware corporation, but doing only an interstate business in Mississippi, herein called "Petitioner" or "Company", files this petition before the Franchise Commissioner of the State Tax Commission of the State of Mississippi, composed of the Honorable A. H. Stone, Chairman, Honorable M. C. Young, and Honorable J. E. Davis, Members, Honorable A. S. Coody, Secretary, and Honorable Greel L. Rice, Attorney General of the State of Mississippi, and for cause of relief, states:

I

That herein sought is a determination that the Petitioner is not taxable by the State of Mississippi under the Franchise Tax Act of 1934, Chapter 121, Laws of 1934, as amended, for the years 1942-1945, inclusive, for the following reasons:

(a) The legislature did not intend to hamper, burden or embarrass interstate commerce by making this statute ap-

plicable to a foreign corporation exclusively engaged in interstate commerce.

(b) If said statute does include such a corporation exclusively so engaged, then it violates:

(1) The Commerce Clause, Article I, Section VIII, of the Constitution of the United States:

(2) The Due Process Clause, Article XIV, Section 1, of the Amendments to the Constitution of the United States; and

(3) The equal Protection Clause, Article XIV, Section 1, of the Amendments to the Constitution of the United States.

II

Petitioner owns and operates a pipeline system originating at the Monroe Gas Field in the State of Louisiana. [fol. 10] Said pipeland system extends from Ouachita Parish, Louisiana, through the Southeast corner of the State of Arkansas, crosses the Mississippi River at Greenville, Mississippi, and continues North through the State of Mississippi into the State of Tennessee at a point South of the corporate limits of the City of Memphis, and thence to Jackson, Tennessee, which is the Eastern terminus of the same, a map whereof, as at February, 1942, is hereto annexed as Exhibit 1. The pipe line system was constructed to serve primarily the City of Memphis, Tennessee. The greater part of the gas transported through the system is delivered by Petitioner to its Tennessee customers, who purchase from Petitioner at wholesale several times the quantities of gas sold by Petitioner to the Mississippi Power & Light Company.

The Petitioner transports through this pipeline system natural gas for sale and delivery at wholesale to the Mississippi Power & Light Comapny, its sole customer in the State of Mississippi, under a contract made without Mississippi.

The Petitioner's sole business in Mississippi is that of selling at wholesale and delivering to the said Mississippi Power & Light Company its natural gas requirements, which said natural gas originates at the Monroe, Louisiana, gas field and moves in a direct and continuous flow from said source to the several delivery points in the State of Mis-

sissippi, where the gas delivered by Petitioner is measured by a thermometer and meter furnished by petitioner, which is the only way in which such gas can be measured. The pressure of the gas is reduced by the Petitioner before it passes into the Mississippi Power & Light Company's hands. The work done by the Petitioner is done upon the flowing gas to help deliver it and is an incident to interstate commerce between Louisiana, Arkansas, Mississippi and Tennessee. The Petitioner simply transports the gas and de-[fol. 11] livers it wholesale not otherwise worked over than to make it ready for delivery to the Mississippi Power & Light Company, which disposes of it by retail. Such deliveries to Mississippi Power & Light Company are made at points on Petitioner's pipe line shown by Exhibit 1. The Mississippi Power & Light Company transports the gas from the various delivery points to the municipalities named hereinafter, where the Mississippi Power & Light Company distributes and sells the same to its customers. The municipalities so served are: Clarksdale, Cleveland, Lake Cormorant, Lula, Lyons, Marigold, Robinsonville, Walls, Shelby, Tunica, Treenville, Greenwood, Indianola, Leland, Moorhead, and Paducah.

The transportation and delivery of the natural gas by Petitioner in Mississippi is a continuous movement and flow in interstate commerce.

The only business transacted by Petitioner in the State of Mississippi is exclusively interstate commerce and is not subject to the taxes here involved in this suit.

Mississippi Power & Light Company, after purchase of the natural gas from Petitioner and at wholesale, distributes the same through its pipelines to its various customers served by it. The Petitioner does not have any participation in or connection with the distribution of the gas, is not qualified in Mississippi to do a retail or intrastate business and has not come into Mississippi for this purpose. Its operations being confined solely to interstate commerce, its contracts made entirely out of this state, and not subject to jurisdiction of the Federal Power Commission.

III

For the years 1942-1945, inclusive, the years in which franchise taxes have been assessed against the Petitioner,

the said Petitioner avers that it was not and is not liable for [fol. 12] the payment of any franchises taxes to the State of Mississippi or any interest thereon, as the Petitioner during all of said years and at the present time has at all times been engaged solely in interstate business in the State of Mississippi, and at no time has engaged in any loval or intrastate business. The Mississippi Franchise tax, as construed by the Supreme Court of Mississippi is in reality an excise or privilege tax exacted of all doing business within the State of Mississippi.

Petitioner avers that during the said years involved in this suit, it cannot be held liable for Mississippi franchise taxes or interest thereon, because:

(a) Petitioner does no intrastate business in Mississippi and has done no intrastate business within the state, and is not doing business within the definition of doing business as set out in the Franchise Tax Act, which term "doing business" is defined in the Act to mean and include each and every act, power, or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the power and privileges acquired by the nature of such organization. To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession and possession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving it of such right, unless congress should see fit to interpose some contrary regulation. Your Petitioner obtains no protection from the State of Mississippi and acquires no powers or privileges in its interstate activity other than the protection afforded your Petitioner by virtue of the payment of an ad valorem tax on the property used by the Company wholly in interstate commerce.

[fol. 13] During the period involved Petitioner has not been domesticated or qualified as a foreign corporation with the right to do intrastate business, has no agent for service of process, has not maintained any offices in Mississippi and has had no employees or representatives therein other

than those necessary to maintain the pipe line and related facilities, and has in no way sought the privilege of doing intrastate business.

It was the plain legislative intent when the tax was applied on foreign corporations to tax such foreign corporations that came into the state, *qualified* under its laws, and employed such capital or its equivalent for which such organization would receive the benefit and protection of the government and laws of the state.

Your petitioner further avers that the Franchise Tax Act has been construed by the Courts of this state as well as the Courts of the United States that a foreign corporation formed for profit is doing business in Mississippi, and is subject to the Franchise Tax Act as soon as it gets ready to be active by having property there and *enjoying the Protection of the state for its, and qualifies formally by filing its Charter, naming its agent for services of process, and thereby qualifies its right to do business within the state.* Under this decision the Petitioner is receiving no additional protection from the government of this state other than the Protection received as a result of a payment of advalorem tax on this very same property; and therefore, does not fall within the provisions of Stone vs. Interstate Natural Gas Company, 103 F. (2nd) 544.

The State of Mississippi may not exact this franchise regulatory tax of the Petitioner for the right to do wholly and solely an interstate business within Mississippi, as [fol. 14] such a tax violates Article I, Section VIII, Constitution of the United States, that, "The Congress shall have power * * * To regulate commerce with foreign Nations, and among the several state-, * * *."

That the franchise tax attempted to be levied by the State of Mississippi is a regulatory tax in that it is applied based on the assessed value of the Petitioner's property, which property has borne an advalorem tax on exactly the same assessment. Such a tax based on the assessed value of the property is in effect a privilege tax charged on this property doing solely an interstate business and whihc licenses as a privilege tax the ownership of this property.

Since the passage by Congress of the Natural Gas Act in 1938, the Federal Power Commission has jurisdiction over Petitioner's rates, contracts, et cetera, as the Peti-

tioner is a corporation engaged solely in the business of transporting natural gas in interstate commerce.

The enfor-ement of the regulatory franchise tax against the Petitioner also violates Article XIV, Section 1, Amendments to the Constitution of the United States," • • • Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV

That the several amounts set out and claimed to be franchise taxes due from Petitioner for the years 1942 through 1945, was determined by the State Tax Commission based on the assessed value of the Company's property located within Mississippi, which method of determination is provided as a minimum alternative computation of franchise taxes by the Act; and Petitioner admits for the purposes of this Petition that the plan *af* assessing franchise taxes [fols. 15-16] by the Tax Commission is proper if any tax at all be due, but Petitioner makes these admissions without prejudice to its legal rights and reserves all rights which it may have under the law. Petitioner further avers that it is not liable for any franchise taxes to the State of Mississippi, but recognizes that if Petitioner is liable then the method of taxation adopted by the Tax Commission is in conformity with the Act, and such a computation produces a liability as asserted by the Tax Commission for the year 1942 $3,432.00, for the year 1943, $3,466.50, for the year 1944 $3,415.50, and for the year 1945 $3,441.00, with interest at the rate of 1% per month from and after the due date of each return, and has served upon this Pe*it*-ioner due demand therefor and demanded payment of said taxes in the aggregate amount as hereinbefore set out of $13,755.00 principal.

V

That at said assessment so thus assumed to be made, this Petitioner feels aggrieved for the reasons hereinbefore stated and, pursuant to its rights under the law, herewith file v th the Commissioner this Petition and Affidavit which sets forth the facts and requesting that the Commissioner

declare that the Petitioner be not liable for this tax in any amount.

That this Petition was filed in accordance with the Franchise Tax Act.

Respectfully, Memphis Natural Gas Company, By H. L. Mann, President.

Duly sworn to by H. L. Mann and A. C. Dearth; jurat omitted in printing.

(Here follows 1 Photolithograph, side folio 17)

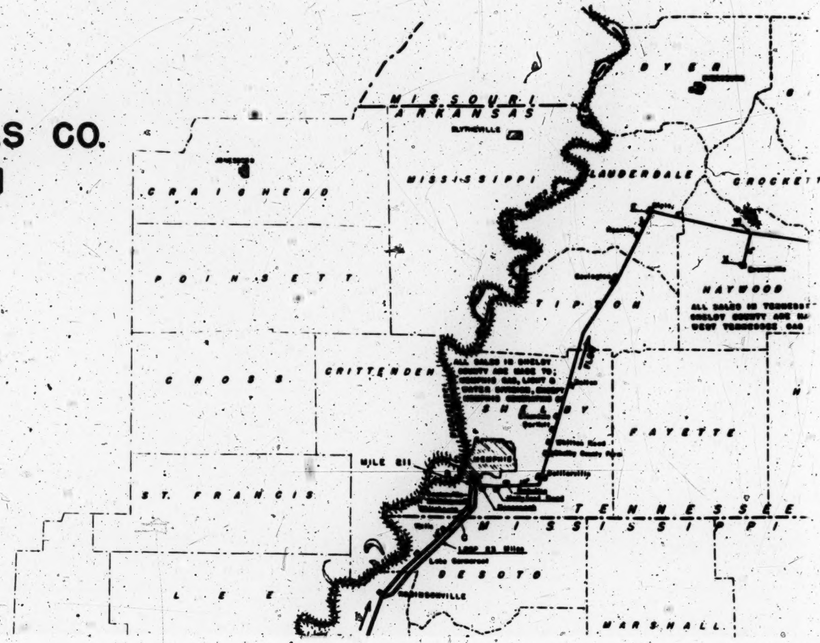
EXHIBIT 1 to PETITION

MEMPHIS NATURAL GAS CO.
PIPE LINE SYSTEM

REVISED FEB. 1942

SCALE 1:1,000,000

10 0 10 20 miles



LITTLE ROCK

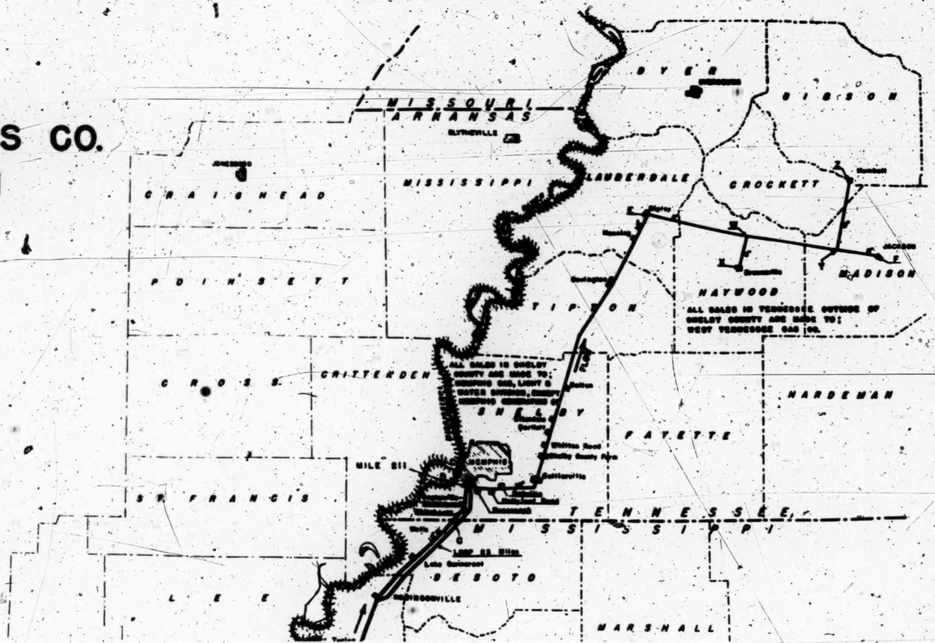
EXHIBIT 1 to PETITION

ATURAL GAS CO.
NE SYSTEM

D FEB. 1942

LE 1:1,000,000

0 10 20 miles



LITTLE ROCK

PINE BLUFF

ARKANSAS

ASHLEY

CHICOT

DESHA

DREW

LINCOLN

JEFFERSON

LEE

PHILLIPS

MONROE

ST. FRANCIS

CROSS

WOODRUFF

WHITE

PRAIRIE

LONOKE

JACKSON

CRITTENDEN

MISSISSIPPI

COAHOMA

BOLIVAR

TUNICA

TATE

DESOTO

MARSHALL

TENNESSEE

FAYETTE

SHELBY

HAR

QUITMAN

TALLAHACHIE

YALOBUSHA

GRENADA

LEFLORE

SUNFLOWER

CARROLL

MONTGOMERY

PANOLA

LAFAYETTE

MEMPHIS

MILE 211

LOOP 33 Miles

Lake Cormorant

HERNANDO

Tunica

LULA COMPRESSING STATION 5040 B.H.P.

MILE 135

Lyons

CLARKSDALE

LOOP 42.43 Miles

Shelby

Rosedale

Cleveland

MILE 93

DONGIT COMPRESSING STATION 5000 B.H.P.

LOOP 24 Mi.

Lake Village

GREENVILLE

Leland

Hollandale

Belzoni

Rolling Fork

Eden

Tchula

Durant

Winona

Duck Hill

Water Valley

Oxford

Batesville

Senatobia

Hernando

Whitton Road

Collierville

Germantown

Millington

Walls

Lake Cormorant

Tunica

Clarksdale

Shelby

Rosedale

Cleveland

Belzoni

Leland

Hollandale

Greenville

Lake Village

Eden

Tchula

Durant

Winona

Duck Hill

Water Valley

Oxford

Batesville

Senatobia

Hernando

Whitton Road

Collierville

Germantown

Millington

Walls

Greenwood

Indianola

Inverness

Moorhead

Sidon

Tchula

Durant

Winona

Duck Hill

Water Valley

Oxford

Batesville

Senatobia

Hernando

Whitton Road

Collierville

Germantown

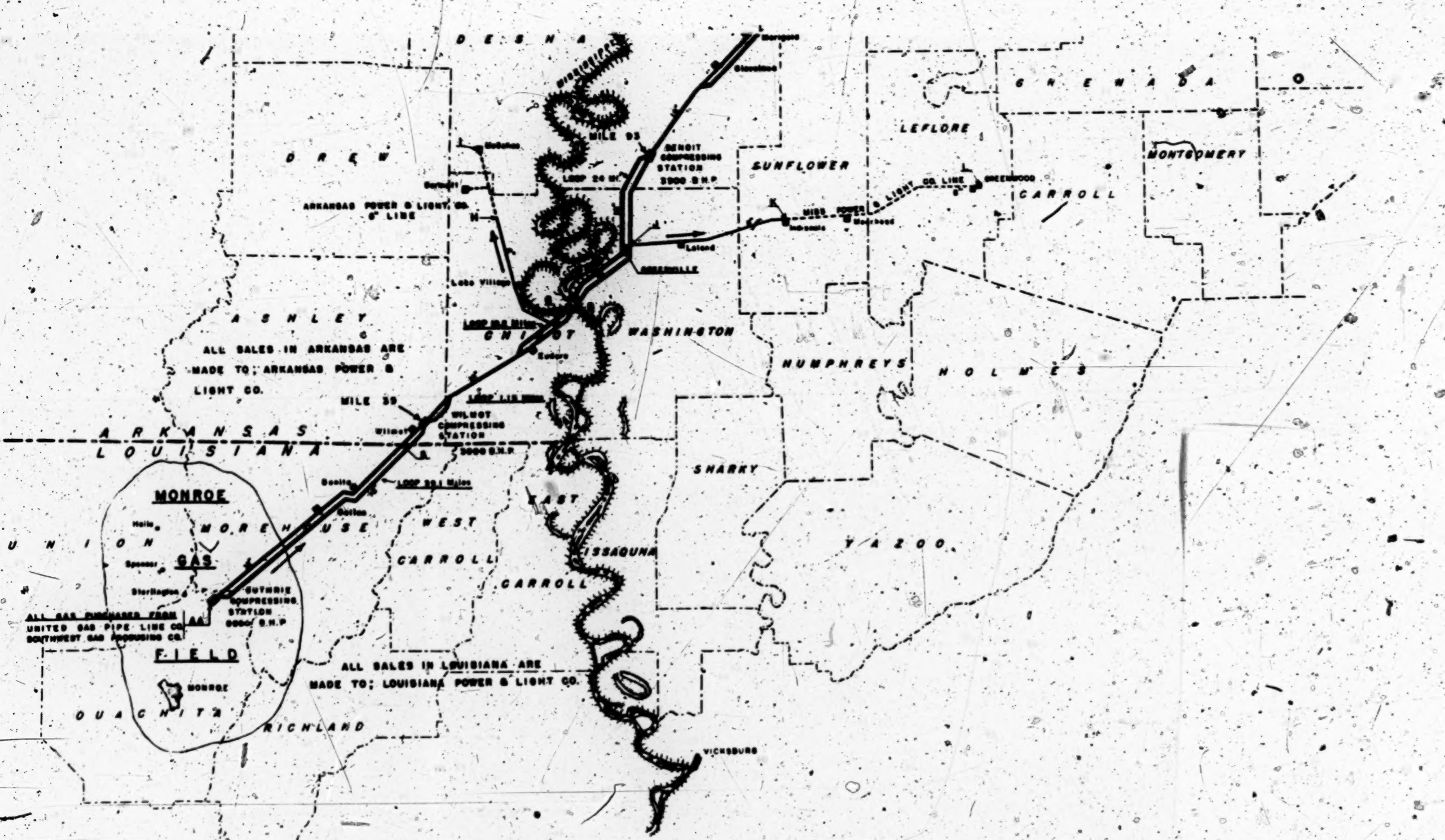
Millington

Walls

ARKANSAS POWER & LIGHT CO. LINE

MISS. POWER & LIGHT CO. LINE

ALL SALES IN MISSISSIPPI ARE MADE TO MISS. POWER & LIGHT CO.


DESHA
DREW
ASHLEY
CHICOT
ARKANSAS
LOUISIANA
MONROE
UNION
MOREHOUSE
OUACHITA
RICHLAND
WEST CARROLL
EAST CARROLL
WASHINGTON
SUNFLOWER
LEFLORE
GRENADA
MONTGOMERY
CARROLL
HUMPHREYS
HOLMES
SHARKY
YAZOO
ISSAQUENA
VICKSBURG
MILE 93
BENOIT COMPRESSING STATION 3000 B.H.P
LOOP 24 MI.
ARKANSAS POWER & LIGHT CO. 6" LINE
Lake Village
LOOP 19.8 MILES
MILE 39
WILMOT COMPRESSING STATION 3000 B.H.P
LOOP 13.5 Miles
GUTHRIE COMPRESSING STATION 3000 B.H.P
ALL SALES IN ARKANSAS ARE MADE TO; ARKANSAS POWER & LIGHT CO.
ALL GAS PURCHASED FROM UNITED GAS PIPE LINE CO. SOUTHWEST GAS PRODUCING CO.
GAS FIELD
ALL SALES IN LOUISIANA ARE MADE TO; LOUISIANA POWER & LIGHT CO.
MISS. POWER & LIGHT CO. LINE
GREENWOOD

[fols. 18-19] Cost Bond on Appeal for $250.00 approved and filed Nov. 1, 1945, omitted in printing.

[fol. 20] IN THE CIRCUIT COURT OF HINDS COUNTY MISSISSIPPI

[Title omitted]

STIPULATION—February 28, 1946

In the interest of brevity and to avoid the necessity of taking proof about facts which are not in dispute, it is stipulated between the parties:

1. The Memphis Natural Gas Company, through its President and Treasurer, executed on September 29, 1945 a petition addressed to the State Tax Commission which was filed on October 1, 1945 with the State Tax Commission and a copy of the same is Exhibit 2 to the petition in this cause for a review of the decision by the State Tax Commission holding the Memphis Natural Gas Company liable for franchise taxes.

2. That all of the facts stated in said petition are true and no proof of the same shall be required in this cause. The Stipulation that the facts are true shall be limited to the facts stated in the petition and the defendants shall not, by virtue of this stipulation, be considered or held to have agreed with any of the legal propositions and arguments made by the Memphis Natural Gas Company in said petition as the parties recognize that these legal questions and arguments are for determination by the Court.

3. That for the years 1942, 1943, 1944 and 1945 the Memphis Natural Gas Company paid ad valorem taxes in Mississippi as reflected by the statement made Exhibit 1 to this stipulation.

4. That the amount of taxes assessed by the State Tax Commission for the years 1942, 1943, and 1944, as shown [fol. 21] on the Order of the State Tax Commission and designated as Exhibit "1" to the petition, are computed on the proper basis, if the contention of the Tax Commission is correct as to liability of the petitioner for Franchise tax. And that the tax due for the year 1945 and subsequent

years, if any, should likewise be computed on the basis of the assessed value of the tangible property owned in Mississippi, so long as the sole business conducted in Mississippi by said petitioner is interstate commerce.

5. That the petitioner owns in its corporate capacity, tangible property consisting of pipe lines and other necessary facilities for transporting gas in the State of Mississippi, of the assessed values from year to year, as shown by the Exhibit to this stipulation, and that the basis of the demand on the petitioner for Franchise taxes for the several years involved is upon the assessed value of said tangible property owned and maintained in the State of Mississippi by the petitioner.

6. That this stipulation may be filed in this cause in lieu of evidence and for the purposes stated.

This 28th day of February, 1946.

Memphis Natural Gas Company, By: Edward P. Russell, By: B. L. Tighe, Jr., Its Attorneys.
State Tax Commission of Mississippi, et al., By: J. B. Sumrall, Its Attorney.

(Here follows Exhibit 1, side folio 22)

[fol. 22]

EXHIBIT 1 TO STIPULATION

ADVALOREM TAXES PAID IN STATE OF MISSISSIPPI

County	1942 Valuation	1942 Rate	1942 Tax Paid	1943 Valuation	1943 Rate	1943 Tax Paid	1944 Valuation	1944 Rate	1944 Tax Paid	1945 Valuation	1945 Rate	1945 Tax Paid
Desoto	212,800.00	4.2356	9,013.52	206,150.00	4.1493	8,553.93	206,150.00	4.5940	9,470.66	186,200.00	4.3848	8,164.66
Tunica	303,600.00	3.5213	10,690.74	288,250.00	3.3894	9,770.09	288,250.00	2.8299	8,157.24	264,400.00	3.3116	8,756.11
Coahoma	711,295.00	3.1119	22,135.46	697,030.00	3.3472	23,331.64	706,005.00	3.6871	26,031.60	695,910.00	3.8319	26,666.80
City of Clarksdale	12,000.00	2.0000	240.00	36,975.00	2.0000	739.50	40,550.00	2.0000	811.00	24,600.00	2.4000	590.40
Sunflower	14,400.00	6.3211	910.24	14,300.00	6.1030	872.73	14,300.00	5.9600	852.28	14,000.00	6.1220	857.09
City of Indianola	13,300.00	1.2250	162.93	13,300.00	1.2500	166.25	13,300.00	1.2500	166.25	13,300.00	1.4000	186.20
Bolivar	681,980.00	3.6385	24,814.38	669,495.00	3.7190	24,898.59	673,745.00	3.6868	24,839.67	622,845.00	3.5345	22,014.80
Washington	361,185.00	3.1830	11,496.53	351,280.00	3.2858	11,542.56	351,230.00	3.3372	11,721.32	485,715.00	3.4620	16,815.63
City of Greenville	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Back taxes—Jonestown C.W.S. 1934–1940 Inclusive	.....	.....	260.00	.....	.....	.....	.....	.....	.....	.....	.....	1,388.05
	2,310,560.00	3.4504	79,723.00	2,276,780.00	3.5082	79,875.29	2,293,530.00	3.5774	82,050.02	2,306,970.00	3.7035	85,439.74

[fol. 23] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

[Title omitted]

MOTION TO HEAR CAUSE IN VACATION—Filed May 24, 1946

Due to the heavy civil docket of this Court at the present term, it is agreed between the parties and their attorneys to move this Court for hearing of the above styled cause in vacation at a date to be mutually agreed upon between the Judge of this Court and the attorneys for both parties.

B. L. Tighe, Jr., Attorney.

[File endorsement omitted.]

[fol. 24] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

[Title omitted]

ORDER FOR HEARING IN VACATION

Motion having been filed in this cause for a hearing in vacation, and the matter having been considered by the Court, and being of the opinion that the same should be heard in vacation, it is, therefore, ordered that the above styled cause be heard in vacation at a date to be mutually agreed upon between the parties.

[fol. 25] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISS.

No. 11664

MEMPHIS NATURAL GAS COMPANY

vs.

STATE TAX COMMISSION OF MISSISSIPPI

JUDGMENT—July 8, 1946

This cause coming on to be heard this day, the same having been set for hearing in vacation inter-m time, as per order of the Court, on petition of the Memphis Natural

Gas Company, a Delaware Corporation, petitioning this Court to assume jurisdiction in this matter in the above styled cause, and to determine if this petitioner is due the State of Mississippi a franchise tax under the Franchise Tax Act of 1934, Chapter 121, Laws of 1934, as amended for the years 1942 to 1945, inclusive.

The Court considered a transcript of the record of the hearings before the State Tax Commission, consisting of the record made by the documents, petition, and records of the Commissioner and the minutes of the proceedings before the State Tax Commission and an agreed stipulation as to the facts in this cause, and all parties being present and represented by counsel, and the Court having heard the petition and considered the agreed stipulation as to facts, and being of the opinion that the said petitioner is not liable to the State of Mississippi for any franchise tax for the years 1942 through 1945 inclusive, and that the order of the Mississippi State Tax Commission made against the petitioner by the Commissioner, and approved by the Commission, was improper and should be held for naught;

It is, therefore, ordered and adjudged that the Memphis Natural Gas Company be not liable for franchise tax to the State of Mississippi for the years 1942— inclusive in any [fol. 26] amount, and that the returns exacted of said petitioner for these years were improper and invalid for the reasons given by this Court in its opinion that said petitioner, operating wholly and entirely in interstate commerce in the State of Mississippi, and not having qualified or domesticated, and seeking no franchise right or intrastate grant from the State, are hereby set aside and held for naught.

Let the costs be dismissed as to the petitioner.

Ordered and adjudged this 8th day of July, 1946.

H. B. Gillespie, Judge.

Approved as to form: State Tax Commission, By: J. H. Sumrall, Attorney. M. B. 27- Page 115 .

[fol. 27] IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISS.

[Title omitted]

PETITION FOR APPEAL—Filed August 23, 1946

To the Honorable H. T. Ashford, Jr., Clerk, Circuit Court:

Whereas, on the 8th day of July 1946, a judgment was rendered in the above styled and numbered cause, whereby the petitioner, Memphis Natural Gas Company, was held to be not liable for Franchise Taxes alleged to be due to the State of Mississippi for the years 1942 through 1945, both inclusive; and

Whereas, A. H. Stone, as chairman of the State Tax Commission of Mississippi, and in said capacity representing the State of Mississippi, the real party in interest, feeling aggrieved at the rendering of said Judgment, and desiring to appeal said cause to the Supreme Court of Mississippi; and

Whereas, Section 1210 of the Code of 1942 provides that any officer of the State or any of its sub-divisions may appeal to the Supreme Court without the filing of a bond, said appeal being taken by the appellant in his official capacity as Chairman of the State Tax Commission, and therefore being entitled to an appeal with supersedeas without the filing of a bond;

Now, therefore, your petitioner, said A. H. Stone, Chairman of the State Tax Commission, hereby petitions your Honor for an appeal to the Supreme Court of Mississippi, and requests that the record consisting of a transcript of the proceedings before the State Tax Commission, the Petition of the said Memphis Natural Gas Company, and the stipulation entered into and filed among the papers in said cause, and the judgment of the Court be transcribed and forwarded to the Clerk of the Supreme Court of Mississippi as the record in said cause for the purpose of appeal ac-

[fol. 28] cording to law.

You are further hereby petitioned to make such notation upon the record as will indicate that the appeal is granted with supersedeas.

Respectfully Submitted, this the 22nd day of August, A. D., 1946.

J. H. Sumrall, Attorney for the Appellant.

[File endorsement omitted.]

[fol. 29] Clerk's Certificate to foregoing transcript and Bill of Costs omitted in printing.

[fol. 30] [File endorsement omitted]

IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 15, 1947

It is respectfully submitted that in the trial of this cause in the lower court, the court committed the following errors, to-wit:

First, by holding that under the law that the appellee, the Memphis Natural Gas Company, was not liable for the franchise tax assessed.

Second, the lower court erred in holding that because the Memphis Natural Gas Company had by an attempted withdrawal from the State of Mississippi, surrendered its authority to do an intra-state business, and therefore was not liable for the franchise tax imposed, simply because it no longer claimed the right to do an intra-state business.

Third, the lower court erred in holding that the owning and using tangible personal property and real estate in the State of Mississippi did not render said company liable for the tax imposed by the franchise tax law upon the right to own and use tangible property in the State of Mississippi, under the protection of the laws and government of the State.

Respectfully submitted (S.) J. H. Sumrall, Attorney for Appellant.

This the 16th day of January A. D. 1947.

[fol. 31] CERTIFICATE

I, J. H. Sumrall, Attorney of Record for the appellant, do hereby certify that I have this date mailed to the proper post office addresses, with sufficient postage attached thereto, true copies of this Assignment of Errors to Hon. Bernard L. Tighe, Jr., Attorney, Jackson, Mississippi, and Hon. E. P. Russell, Attorney, Memphis, Tennessee, Attorneys of Record for the appellee.

This 16th day of January A. D. 1947.

(S.) J. H. Sumrall, Attorney for the Appellant.

[fol. 32] IN THE SUPREME COURT OF MISSISSIPPI

15963 In Banc

A. H. STONE, Chairman,

v.

MEMPHIS NATURAL GAS COMPANY

OPINION—February 24, 1947

GRIFFITH, J.:

Appellee, a Delaware corporation, owns and operates a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis in the State of Tennessee, and beyond. The pipe line enters Mississippi at a point a few miles south of Greenville, and runs thence, in this State, towards the north in a general direction parallel with the Mississippi River, and enters Tennessee at a point almost directly south of Memphis. The map of line, made a part of the record, shows that there are approximately 135 miles of it in this State, and that the system includes two compressing stations at points in this State.

There is a stipulation in the record covering the further facts, and these are that appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another state; that appellee company has not been domesticated or qualified [fol. 33] as a foreign corporation with the right to do intra-

state business; has no agent for service of process and has not had any such agent, and has maintained no office, in this State; and that it has no employes or representatives in this State other than those necessary to maintain the pipe line and its related facilities.

The State, through its Tax Commission, has demanded of appellee company the payment of the corporation franchise tax imposed under Secs. 9312-9340, Code 1942, for the years 1942, 1943 and 1944, and has entered its order adjudging appellee liable therefor, from which order appellee, under Sec. 9328, has appealed for a review by the courts, contending that inasmuch as appellee does no intrastate business whatever in Mississippi, and is not qualified to do any intrastate business therein, no tax of any kind can be levied by the State against it other than the ad valorem taxes which it has always fully paid—that any other tax, and particularly a franchise tax, would be to tax interstate commerce.

The franchise tax here sought to be collected by the State is not a tax upon "doing business" as that term is ordinarily understood in the purely commercial sense, but is that which is defined in the statute Secs. 9312 and 9314, as follows: "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful [fol. 34] activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.

This statutory definition was first approved in the connection here involved as within the power of the State in Stone v. International Natural Gas Co., 103 Fed. (2nd) 544, affirmed 308 U. S. 522. Subsequently, in a connection equally pertinent in principle, it was approved and sus-

tained by this Court in Stone v. General Contract Purchase Corp., 193 Miss. 301, 312, and in Stone v. General Electric Contracts Corp., 193 Miss. 317; it being further held in the latter case that when the incidental local activities come within the definition, it would be immaterial that the foreign corporation had no local agents, and has no office, and is not qualified to do any intrastate business in this State.

It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it has no substantial effect to block or impede the free flow of such commerce.

And more recently there has been a pronounced trend that, in order to make a more reasonable accommodation [fol. 35] between local needs and the dominant requirement of freedom in the national commerce, recognition shall be given to a rule as follows: That although a particular activity may be essential to the continued full and unimpeded flow of commerce between the states as regards a particular commodity or other matter of such commerce, yet if that activity is of a substantial character, and is one which actually and distinctly happens in the particular State and must be, and is, protected by that State regardless of the ultimate purpose of the activity, then for the purpose of laying a tax as a recompense for the local protection afforded, the State may detach the activity so long as the exaction on account of it is not made a pretext to impose a burden which would have the effect, beyond that which is remote or unsubstantial, to interfere with the national interests.

The present case may be reduced, therefore, to two questions: (1) Are the incidental local activities carried on by appellee corporation in this State substantial in nature and extent,—the active maintenance, supervision and repair in this state of 135 miles of pipe line and its related equipment? An affirmative answer to that question is obvious. (2) Does the franchise tax here demanded amount to enough to have any substantial effect to block or impede the free flow of commerce, or is it at all out of reasonable proportion to the services and protection which must be

furnished by the State in and about the stated local activities? The franchise tax demanded is approximately $3,400 per annum, whereas the ad valorem taxes are approximately $82,000 a year, whence the obvious answer to this last question must be in the negative.

Reversed and judgment here for appellant.

[File endorsement omitted.]

[fol. 36] IN THE SUPREME COURT OF MISSISSIPPI

36329

A. H. STONE, Chairman,

vs.

MEMPHIS NATURAL GAS COMPANY

JUDGMENT—February 24, 1947

This cause having been submitted at a former day of this term on the record herein from the Circuit Court of Hinds County and this court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 8th day of July 1946, be and the same is hereby reversed and this court now, here, proceeding to render and enter the judgment that should have been entered in the court below doth order and adjudge that the appellant, A. H. Stone, Chairman of the State Tax Commission do have and recover of and from the appellee, Memphis Natural Gas Company, for Franchise Tax for the year 1942, in the sum of $3,432.00, for the year 1943 in the sum of $3,466.50, and for the year 1944 in the sum of $3,415.50, with statutory interest at the rate of 12 per centum per annum from the respective due dates and all of the costs of this court and in the court below to be taxed, etc.

[fol. 37] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

MOTION OF THE PETITIONER FOR AN ORDER STAYING THE MANDATE OF THE SUPREME COURT OF MISSISSIPPI—Filed March 29, 1947

To: Honorable Sidney Smith, Chief Justice of the Supreme Court of Mississippi.

Your petitioner, Memphis Natural Gas Company, a Delaware Corporation, respectfully presents this, its application for an order staying the issuance of the mandate of the Supreme Court of Mississippi, under the provisions of Section 8 (d) of the Act of Congress of February 13, 1925, (U. S. Code, Title 28, Section 350) and assigns the following grounds therefor.

The nature of this cause is such that the State of Mississippi, through its Tax Commission, has demanded of petitioner the payment of a corporation franchise tax imposed under Sections 9312-9340 of the Mississippi Code 1942, for the years 1942, 1943, and 1944, and said Tax Commission entered its order adjudging petitioner liable therefor, from which order petitioner, under Section 9328, appealed to the Circuit Court of the First Judicial District, Hinds County, Mississippi, and which Court reversed the order of the Tax Commission. The State Tax Commissioner appealed from the order and judgment of the Circuit Court of Hinds County, as aforesaid, to the Supreme Court of Mississippi.

The Supreme Court of Mississippi, on February 24, 1947, reversed the order of the Circuit Court of Hinds County, Mississippi, First Judicial District, and proceeded to render and enter a judgment in this cause and adjudged that the [fol. 38] Appellant, A. H. Stone, Chairman of the State Tax Commission, have and recover from the Appellee, Memphis Natural Gas Company, for franchise tax for the year 1942 the sum of $3,432.00, for the year 1943 the sum of $3,466.50, and for the year 1944 the sum of $3,115.50 with statutory interest at the rate of 12 per centum per annum from the respective due dates, together with all costs of this Court

and in the Court below, and said judgment was and is now recorded on the Docket of this Honorable Court.

Petitioner contends that said order and judgment is contrary to the laws and constitution of the United States in that it imposes an undue burden on interstate commerce by reason of the fact that petitioner is engaged wholly in interstate commerce and does no intrastate business within the State of Mississippi, and said tax imposed violates the Commerce Clause, Article I, Section 8 of the Constitution of the United States; The Due Process Clause, Article XIV, Section 1 of the Ammendments to the Constitution of the United States; The Equal Protection Clause, Article XIV, Section 1 of the Ammendments to the Constitution of the United States.

And your petitioner further represents and he relies upon the following:

1. The Supreme Court of the State of Mississippi has decided a federal question of substance in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

2. The Supreme Court of the State of Mississippi has decided an important question of local law in a way which is in conflict with applicable decisions of the Supreme Court of the United States, and has decided an important question of general law in a way probably untenable or in conflict with the great weight [fol. 39] of authority and has decided an important question of federal law and a federal question in a way probably in conflict with applicable decisions of the United States Supreme Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision by the Supreme Court of the United States.

3. In order to permit and enable petitioner to apply for and obtain a writ of Certiorari. The judgment in Cause No. 36,329, of the Supreme Court of Mississippi is a final judgment, is subject to a review by certiorari from the United States Supreme Court, and the execution and enforcement of such judgment should be stayed for a reasonable length of time to enable petitioner, as the ag-rieved party, to apply for and obtain a Writ of Certiorari from said Supreme Court of the United

States. Petitioner shows the court that it will require a period of at least 45 days to apply for a certiorari and have printed and certified a transcript of the record from the Clerk of this Court and to prepare and file the required printed copies of petition and brief and apply for said Writ of Certiorari.

Wherefore petitioner respectfully submits and moves this Honorable Court to grant its order staying the execution of the mandate as aforesaid.

Respectfully submitted, —— ——, Jr., Of Counsel for Petitioner.

[fol. 40] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

ORDER STAYING THE EXECUTION OF JUDGMENT—Filed March 29, 1947

Petitioner in the above numbered and entitled cause, having made proper application for stay of mandate, execution, and enforcement of the judgment rendered in the above entitled cause, and the undersigned Chief Justice of the Supreme Court of Mississippi having duly considered the same and having been fully advised at the premises, it is hereby ordered that the mandate execution, and enforcement of the final judgment rendered against petitioner and in favor of A. H. Stone, Chairman of the State Tax Commission in complaint No. 36,329, on the Docket of the Supreme Court of Mississippi, be, and the same are ordered stayed for a period of 90 days in order to enable petitioner to apply for a writ of Certiorari from the Supreme Court of the United States, but the surety bond, which is usually required in such cases, making petitioner answerable for all damages and costs which the State Tax Commissioner might sustain by reason of this stay, is hereby waived and said petitioner is not required to execute any bond as a precedent for this order staying the execution of the judgment herein. It is therefore ordered and adjudged that the mandate, execution, and enforcement of the final judg-

ment rendered against petitioner in favor of A. H. Stone, Chairman of the State Tax Commission, is hereby stayed for a period of 90 days to enable petitioner to apply for a Writ [fol. 41] of Certiorari from the Supreme Court of the United States; and it is further ordered that this Stay Order shall be filed with the Clerk of the Supreme Court of Mississippi, who shall be bound accordingly.

Witness my signature this the 29th day of March, 1947.

Sydney Smith, Chief Justice of the Supreme Court of Mississippi.

[fol. 42] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 16, 1947

The petition herein for a writ of certiorari to the Supreme Court of the State of Mississippi is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1383

MEMPHIS NATURAL GAS COMPANY,
Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,
Respondent

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1383

MEMPHIS NATURAL GAS COMPANY,

Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,

Respondent

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitioner, Memphis Natural Gas Company, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Mississippi.

Summary Statement of the Matter Involved

The question is whether or not Mississippi will be allowed to exact a franchise or excise tax from an undomesticated foreign corporation for the privilege of doing in Mississippi solely interstate business and thus violate the Commerce Clause of the United States Constitution, Article I, Section 8.

The State Tax Commission of Mississippi decided that petitioner is liable for the franchise taxes. Petitioner appealed to the State Circuit Court which reversed the Tax Commission. The Tax Commission appealed to the Supreme Court of Mississippi which reversed the Circuit Court and entered final judgment against petitioner on February 24, 1947 in the approximate amount of $3,400.00 for each of the years 1942, 1943 and 1944 plus statutory interest at 1% per month (R. 22).

The facts are not in dispute. They are clearly and briefly stated in the opinion of the Supreme Court of Mississippi:

> "Appellee, a Delaware corporation, owns and operates a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis in the State of Tennessee and beyond. The pipe line enters Mississippi at a point a few miles south of Greenville, and runs thence, in this State, towards the north in a general direction parallel with the Mississippi River, and enters Tennessee at a point almost directly south of Memphis. The map of the line, made a part of the record, shows that there are approximately 135 miles of it in this State, and that the system includes two compressing stations at points in this State.
>
> "There is a stipulation in the record covering the further facts, and these are that appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another state; that appellee company has not been domesticated or qualified as a foreign corporation with the right to do intrastate business; has no agent for service of process and has not had any such agent, and has maintained no office, in this State; and that it has no employees or representatives in this

State other than those necessary to maintain the pipe line and its related facilities" (R. 19).

Petitioner pays to Mississippi *ad valorem* taxes amounting to approximately $82,000.00 a year (R. 14a) and also an income tax upon that part of its net income fairly attributable to activities in Mississippi.

State Tax Commission v. *Memphis Natural Gas Co.*, 197 Miss. 583 (10/9/44), certiorari denied 323 U. S. 682.

Chapter 121 of the 1934 Public Acts of Mississippi, p. 204 as amended by Chapter 115 of the 1940 Public Acts of Mississippi, p. 105, imposes the "franchise or excise tax" upon both domestic and foreign corporations in such manner that there is no discrimination against foreign corporations. The only question involved is whether or not the tax violates the Commerce Clause.

The Act defines "doing business":

> "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."
>
> "TAX ON FOREIGN CORPORATIONS.—For the year 1940 and anually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being

> the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

The Supreme Court of Mississippi held that:

> "there is no attempt to tax interstate commerce as such"

which petitioner admits. The court then said that the petitioner is liable for the tax

> "as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise manning the facilities of the system throughout the 135 miles of its line in this State."

In other words, the Supreme Court of Mississippi held that petitioner must pay a "franchise or excise" tax for the privilege of owning and maintaining in Mississippi facilities necessary to conduct an exclusively interstate business.

The Supreme Court of Mississippi justified its conclusion by resort to "trends" in judicial writing and, in substance, forecast that a long line of unbroken decisions of this Court are now to be ignored and heaved overboard. It cited no decisions of this Court to sustain its conclusions.

The Court Has Jurisdiction

This Court has explicit authority to review by certiorari a final judgment in the highest court of a State

> "where is drawn in question . . . the validity of a statute of any State on the ground of its being re-

pugnant to the Constitution . . . of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . .'' 237 Judicial Code (b), 28 USCA, 344(b).

In this suit "a state court has decided a Federal question of substance . . . in a way probably not in accord with applicable decisions of this court." Supreme Court Rule 38, 5(a).

This Court has never decided that an undomesticated foreign corporation engaged exclusively in interstate commerce must pay a State a tax for the privilege of engaging in such commerce.

The Federal question was presented to the State Tax Commission in the pleadings filed with the Commission (R. 5) and overruled. It was considered by the Circuit Court and sustained (R. 15). It was considered by the Supreme Court of Mississippi and overruled (R. 19).

The Supreme Court of Mississippi is the highest court of that State and the judgment entered against petitioner on February 24, 1947 is final (R. 22).

The Question Presented

Admittedly petitioner is engaged in Mississippi solely in interstate commerce. It pays to Mississippi *ad valorem* and income taxes and thus contributes materially to the cost of local government. An undomesticated foreign corporation has the right to engage in Mississippi in interstate commerce without paying for the privilege as the privilege flows from the Commerce Clause of the Federal Constitution and may not be directly burdened by the imposition of a local "franchise or excise tax."

Reasons Relied upon for Allowance of Writ

To a limited extent it has become the fashion for state courts to indulge in judicial prophesies, "trends" and forecasts by jumping at unwarranted legal conclusions and ignoring principles decided by this Court in long and unbroken lines of decisions. The Supreme Court of Mississippi cited not a single decision of this Court to justify its opinion as none are available. It stated that "more recently there has been a pronounced trend" to burden interstate commerce by "a tax as a recompense for the local protection afforded" if the effect is not "to interfere with the national interests." It further stated that the collection of this tax from petitioner is justified for protection of "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State."

This Court has repeatedly stated that such interstate properties may be burdened with *ad valorem* taxes, income taxes upon that part of the net income reasonably attributable to activities within the taxing State, and a proper part of the cost of enforcing police regulations. This Court has never said, however, that the States may go further and exact a toll for the right to use the facilities in interstate commerce.

In *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101 the Circuit Court of Appeals for the Second Circuit was reversed for "foreshadowing 'trends'" by departing from an "unbroken line of decisions" of this Court and sustaining a franchise tax for the privilege of doing an exclusively interstate business in Connecticut.

Connecticut imposed on corporations "a tax or excise upon its franchise for the privilege of carrying on or doing business within the State . . ." The taxpayer, an undomesticated foreign corporation, was engaged in Con-

necticut exclusively in interstate commerce. The Connecticut courts had not previously construed the statute. It was therefore uncertain whether Connecticut intended the tax to be limited to the privilege of doing intrastate business or intended it to go further and be applicable to interstate business. The Federal District Court thought Connecticut intended it to be limited to intrastate business while the Circuit Court of Appeals thought Connecticut intended it to also reach interstate business.

This Court pretermitted the legality of the tax imposition and reversed the Circuit Court with directions that the suit in the Federal Courts be held in abeyance until the courts of Connecticut construed the statute.

This Court said:

> "Once doubts purely local to the Constitution and laws of Connecticut are resolved against the petitioner there are at stake in this case questions of moment touching the taxing powers of the States and their relation to the overriding national interests embodied in the Commerce Clause . . ."

This Court further said:

> ". . . If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of constitutional history and 'an unbroken line of decisions' would indeed be brought into question."

The import of this Court's opinion is that Connecticut will not be permitted to exact a tax for the privilege of engaging exclusively in interstate commerce if the state court construes the statute, as construed by the Second Circuit Court of Appeals, to impose the tax upon a business engaged exclusively in interstate commerce.

This Court has repeatedly stated:

> "that a state law is unconstitutional and void which requires a party to take out a license for carrying on

interstate commerce, no matter how specious the pretext may be for imposing it.".

Mississippi has decided that the petitioner must take out and pay for a license to carry on interstate commerce. The question is whether or not this is now permissible under the Commerce Clause of the Constitution of the United States. The Supreme Court of Mississippi says the "trend" of judicial writing permits the tax. But this violates "a long course of constitutional history" and "an unbroken line of decisions."

We rely on the decisions of this Court which should not be overruled by resort to "trends".

There seems to be probable cause for this Court to review the decision of the Supreme Court of Mississippi as its effect will be devastating if unchallenged.

Respectfully submitted,

EDWARD P. RUSSELL,
29th Floor Sterick Building,
Memphis, Tennessee,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1383

MEMPHIS NATURAL GAS COMPANY,

Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The opinion of the Supreme Court of Mississippi is printed in full in the record (R. 19) and also at the end of this brief.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, 28 USCA, 344(b) as "a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question . . . the validity of a statute of any State on the ground of its being repugnant to the

Constitution . . . of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution . . . of the United States."

The jurisdiction of this Court is also invoked under Supreme Court Rule 38, 5(a) as "a state court has decided a Federal question of substance . . . in a way probably not in accord with applicable decisions of this court."

Judgment was entered in this suit by the Supreme Court of Mississippi on February 24, 1947 (R. 22).

Statement of the Case

Petitioner was cited by the State Tax Commission of Mississippi to appear and show cause why it should not be required to pay the "franchise or excise" tax imposed by Chapter 121 of the 1934 Public Acts of Mississippi, page 204, as amended by Chapter 115 of the 1940 Public Acts of Mississippi, page 105. The tax is $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed in Mississippi.

Petitioner filed with the State Tax Commission a comprehensive statement of the nature and scope of its business in Mississippi and alleged that the imposition of the tax violates constitutional immunities (R. 5). The Commission disagreed with petitioner and entered an order sustaining the tax liability (R. 4).

Petitioner appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi which reversed the Tax Commission and held petitioner not liable for the taxes as "petitioner is operating wholly and entirely in interstate commerce in the State of Mississippi, and not having qualified or domesticated, and seeking no franchise right or intrastate grant from the State" is not liable for such a tax (R. 16).

The Supreme Court of Mississippi reversed the Circuit Court and entered the final judgment (R. 22).

Petitioner is a Delaware corporation with general offices in Memphis, Tennessee. It owns and operates a pipe line extending from the gas fields in the vicinity of Monroe, Louisiana through the southeast corner of Arkansas, thence crosses the Mississippi River at Greenville and extends north parallel with the Mississippi River into Tennessee where the City of Memphis is its principal market.

A stipulation was made that all of the facts appearing in the petition filed by petitioner with the State Tax Commission are true (R. 13). The Supreme Court of Mississippi summarized in its opinion the undisputed facts and they are, therefore, not repeated at this point.

Petitioner's position is that innumerable decisions of this Court prohibit the levy of a tax for the privilege of doing interstate business. If petitioner had domesticated in Mississippi and thus sought the privilege of intrastate business, a different question would be presented. It is undisputed that the petitioner, during the years involved, was not in any manner qualified in Mississippi to do any local or intrastate business. It is further undisputed that it did not even have an agent for service of process. It is undisputed that every act by petitioner during the years in question was strictly in furtherance of interstate commerce. It is likewise undisputed that petitioner enjoyed no privilege or franchise from Mississippi because it needed none. The privilege or franchise to engage in interstate commerce is assured to all by the Federal Constitution.

A franchise or excise is a privilege granted by the sovereignty to do some act which cannot lawfully be done without this grant from the sovereign power. Petitioner requires no grant from Mississippi because the Commerce Clause confers upon all the right to engage in interstate business without having to pay a state for the privilege.

Errors Relied Upon

The Supreme Court of Mississippi erred in holding that Mississippi can exact a franchise tax from an undomesticated foreign corporation for the privilege of doing solely interstate business because the imposition of the tax violates the Commerce Clause of the United States Constitution.

The court further erred in holding that petitioner's activities "in maintaining, keeping in repair, and otherwise in manning the facilities of the system" for interstate commerce are local activities which enable Mississippi to exact a privilege tax.

The Supreme Court of Mississippi further erred in basing its decision on a "trend" of the times and thus ignoring a long line of decisions of this Court that a state may not exact a tax for the privilege of carrying on interstate commerce.

The Supreme Court of Mississippi further erred in holding that it is permissible to exact this privilege tax from interstate commerce because a similar tax is exacted by Mississippi from its domestic corporations.

Argument

It will be of questionable value to undertake at this point an extended argument about the vices of a direct privilege tax imposed upon interstate commerce. The question has been discussed and passed upon in numerous decisions by this Court. There have been several recent decisions of this Court plainly manifesting the purpose of this Court to adhere to the principle that a state cannot tax the privilege of engaging in interstate commerce.

The invalidity of the tax can be demonstrated by reference to innumerable decisions of this Court. The Supreme Court of Mississippi made no mention of any of them

though many of the leading cases on the subject were cited and discussed in petitioner's brief in the Supreme Court of Mississippi.

The great importance of the question here involved is emphasized in a recent decision of this Court.

Spector Motor Service v. *McLaughlin*, 323 U. S. 101.

Connecticut imposed on business within the state "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state . . ."

This court said:

> "* * *. Petitioner, a Missouri corporation with its principal place of business in Illinois, is engaged exclusively in the interstate trucking business. It is neither authorized by Connecticut to do intrastate trucking nor in fact does it engage in it. It maintains two leased terminals in Connecticut solely for the purpose of carrying on its interstate business. At the request of its lessor, it has filed with the Secretary of State in Connecticut a certificate of its incorporation in Missouri, has designated an agent in Connecticut for service of process, and has paid the statutory fee."

The State Tax Commissioner decided that there was liability for the tax, and thereupon the taxpayer sought an injunction in the United States District Court, alleging that the tax offends provisions of the Commerce and Due Process Clauses of the United States Constitution.

This Court said:

> "The District Court construed the statute to be 'a tax upon the exercise of a franchise to carry on intrastate commerce in the state' and therefore not applicable to the petitioner."

The Circuit Court of Appeals for the Second Circuit construed the statute to reach all corporations, whether engaged in intrastate or interstate commerce.

This Court said:

"* * *. It was conceded below that if the Connecticut tax was construed to cover petitioner it would run afoul the Commerce Clause, were this Court to adhere to what Judge Learned Hand called 'an unbroken line of decisions.' On the basis of what it deemed foreshadowing 'trends', the majority ventured the prophecy that this Court would change its course, and accordingly sustained the tax. In view of the far-reaching import of such a disposition by the Circuit Court of Appeals we brought the case here. 322 U. S. 720, 64 S. Ct. 1155.

"Once doubts purely local to the Constitution and laws of Connecticut are resolved against the petitioner there are at stake in this case questions of moment touching the taxing powers of the States and their relation to the overriding national interests embodied in the Commerce Clause. * * *

This Court further said:

"* * *. If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of constitutional history and 'an unbroken line of decisions' would indeed be brought into question."

"* * *. But even if the statute hits aspects of an exclusively interstate business, it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below."

The Circuit Court of Appeals was reversed and the suit remanded to the District Court with directions that the litigation be held "in the federal courts until definite determinations on local law are made by the state courts * * *."

The import of the decision by the Supreme Court of the United States plainly is that lower courts are not to be encouraged to guess and speculate about possible trends in the Supreme Court of the United States by departing from "an unbroken line of decisions" and sustaining a franchise tax for the privilege of doing exclusively interstate commerce, as such a tax violates "an unbroken line of decisions."

The attention of the Supreme Court of Mississippi was directed to

Freeman v. *Hewit*, — U. S. — (12/16/1946),

in which this Court said:

> "A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."
>
> . . . . . .
>
> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. ***But it cannot aim to control that trade even though it desires to control its own.*** It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to

the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce."

* * * * * * *

"Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."

To offset the foregoing the only Federal case cited by the Supreme Court of Mississippi is:

Stone v. *Interstate Natural Gas Co.*, 103 F. (2) 544 (5 C).

It was affirmed in

Interstate Natural Gas Co. v. *A. H. Stone, Commissioner*, 308 U. S. 522.

The entry was:

"December 11, 1939. Per curiam. The judgment is affirmed. Southern Natural Gas Corporation *v.* State of Alabama, 301 U. S. 148."

The Supreme Court of Mississippi took the position that *Interstate Natural Gas Co.* v. *Stone* authorizes imposition of the tax upon petitioner, but such reasoning is erroneous. The suit involved this same Mississippi franchise statute. Interstate, also a natural gas pipe line extending from

Louisiana to and through Mississippi, was held liable for the tax because, as emphasized in the opinion:

> "As a foreign corporation it filed with the Secretary of State under other statutes as a prerequisite to doing business in Mississippi a copy of its charter, and paid a required fee of $500, and appointed an agent for service of process."

The court said the effect of doing these things is that:

> "When this Gas Company, though it did not domesticate, filed its charter and appointed its agent for service in order to qualify for doing business in the old sense, it began the enjoyment in Mississippi of a privilege incident to its corporate organization, it began to 'do business' in the new and artificial sense."

If a corporation elects to enter a State and seek a local privilege, it must pay therefor and cannot avoid the tax on the ground that the greater part of its business is interstate. The election to either do or seek the privilege of doing a very trifling amount of local business is adequate to sustain the privilege tax.

In this case of *Stone* v. *Interstate Natural Gas Company* the court has above twice emphasized the effect of the foreign corporation filing its charter, appointing a process agent and paying $500.00 for the privilege of local business. To be certain that the reader clearly understands the basis for the decision, the court tells the reader a third time about the effect of filing the charter and naming an agent for service of process. The court said:

> "By the Legislature's queer definition, a foreign corporation formed for profit is doing business in Mississippi and is taxable as soon as it gets ready to be active by having property there and enjoying the protection of the State for it, and qualifies formally by filing its charter and naming its agent for process

service. *These latter acts clearly mark its appearance in the State.*"

The court reemphasizes the controlling point for a fourth time:

> "The charter which the Gas Company filed and obtained the right to enjoy in Mississippi grants to it power to do much more than to engage in the interstate transportation of gas and oil."

In its simplest form, Interstate was liable for the tax because it chose to file in Mississippi its charter and thereby secured the right to do a local business.

This Court refused certiorari in the *Interstate* case on the strength of the following case in which the foreign pipe line corporation also qualified to do intrastate business: *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148.

Mr. Chief Justice Hughes stated:

> "Appellant was organized prior to May 12, 1928, under the laws of Delaware and on that date it qualified to do business in Alabama. It named a statutory agent and filed in the office of the Secretary of State a copy of its charter which covers a wide range of activities. It has paid annually the required permit fee. At the time of the assessment in question appellant maintained its office and chief place of business in the city of Birmingham, Ala. The entire management, control, and conduct of its business was conducted from that office."
>
> * * * * * *
>
> "By compliance with the statute appellant obtained the privilege of engaging within the State in any of the activities which its charter authorized."
>
> * * * * * *
>
> "From the agreed facts we are unable to conclude that the business thus conducted in Alabama was

entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana, it appears that appellant carried on in Alabama activities of an intrastate character."

In addition to the foregoing activities, this Court pointed out that Southern Natural Gas Corporation actually distributed gas in Alabama which is intrastate business. It necessarily follows for a number of reasons that it was liable for the franchise taxes. It is obvious that *Stone* v. *Interstate Natural Gas Co.*, affirmed on the strength of *Southern Natural Gas Corporation* v. *Alabama*, was correctly decided because, as stated in *Stone* v. *Interstate Natural Gas Co.*, the pipe line corporation qualified in Mississippi

> "formally by filing its charter and naming its agent for service of process. These latter acts clearly mark its appearance in the State."

Petitioner, Memphis Natural Gas Company, has not done these things and the decision is therefore not applicable to it and has been erroneously applied.

Conclusion

We respectfully submit that the Supreme Court of Mississippi has gravely erred and that probable cause has been shown for this Court to review its decision.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,329

(Opinion Rendered February 24, 1947)

In Banc

A. H. Stone, *Chairman*,

vs.

Memphis Natural Gas Company

Griffith, *J.*:

Appellee, a Delaware corporation, owns and operates a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis in the State of Tennessee, and beyond. The pipe line enters Mississippi at a point a few miles south of Greenville, and runs thence, in this State, towards the north in a general direction parallel with the Mississippi River, and enters Tennessee at a point almost directly south of Memphis. The map of the line, made a part of the record, shows that there are approximately 135 miles of it in this State, and that the system includes two compressing stations at points in this State.

There is a stipulation in the record covering the further facts, and these are that appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another state; that appellee company has not been domesticated or qualified as a foreign corporation with the right to do intrastate business; has no agent for service of process and has not had any such agent, and has maintained no office, in this State; and that it has no employes or representatives in this State other than those necessary to maintain the pipe line and its related facilities.

The State, through its Tax Commission, has demanded of appellee company the payment of the corporation franchise tax imposed under Secs. 9312-9340, Code 1942, for the years 1942, 1943, and 1944, and has entered its order adjudging appellee liable therefor, from which order appellee, under Sec. 9328, has appealed for a review by the courts, contending that inasmuch as appellee does no intrastate business whatever in Mississippi, and is not qualified to do any intrastate business therein, no tax of any kind can be levied by the State against it other than the ad valorem taxes which it has always fully paid—that any other tax, and particularly a franchise tax, would be to tax interstate commerce.

The franchise tax here sought to be collected by the State is not a tax upon "doing business" as that term is ordinarily understood in the purely commercial sense, but is that which is defined in the statute Secs. 9312 and 9314, as follows: "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.

This statutory definition was first approved in the connection here involved as within the power of the State in Stone *v.* International Natural Gas Co., 103 Fed. (2nd) 544, affirmed 308 U. S. 522. Subsequently, in a connection equally pertinent in principle, it was approved and sustained by this Court in Stone *v.* General Contract Purchase

Corp., 193 Miss. 301, 312, and in Stone *v.* General Electric Contracts Corp., 193 Miss. 317; it being further held in the latter case that when the incidental local activities come within the definition, it would be immaterial that the foreign corporation had no local agents, and has no office, and is not qualified to do any intrastate business in this State.

It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it has no substantial effect to block or impede the free flow of such commerce.

And more recently there has been a pronounced trend that, in order to make a more reasonable accommodation between local needs and the domniant requirement of freedom in the national commerce, recognition shall be given to a rule as follows: That although a particular activity may be essential to the continued full and unimpeded flow of commerce between the states as regards a particular commodity or other matter of such commerce, yet if that activity is of a substantial character, and is one which actually and distinctly happens in the particular State and must be, and is, protected by that State regardless of the ultimate purpose of the activity, then for the purpose of laying a tax as a recompense for the local protection afforded, the State may detach the activity so long as the exaction on account of it is not made a pretext to impose a burden which would have the effect, beyond that which is remote or unsubstantial, to interfere with the national interests.

The present case may be reduced, therefore, to two questions: (1) Are the incidental local activities carried on by appellee corporation in this State substantial in nature and extent,—the active maintenance, supervision and repair in this state of 135 miles of pipe line and its related equipment? An affirmative answer to that question is obvious. (2) Does the franchise tax here demanded amount

to enough to have any substantial effect to block or impede the free flow of commerce, or is it at all out of reasonable proportion to the services and protection which must be furnished by the State in and about the stated local activities? The franchise tax demanded is approximately $3,400 per annum, whereas the ad valorem taxes are approximately $82,000 a year, whence the obvious answer to this last question must be in the negative.

Reversed and Judgment Here for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 94

MEMPHIS NATURAL GAS COMPANY,
Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,
Respondent

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT BY PETITIONER

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SUPREME COURT OF THE UNITED STATES

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A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,
Respondent

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT BY PETITIONER

MAY IT PLEASE THE COURT:

The petitioner, Memphis Natural Gas Company, filed its petition for a writ of certiorari to review an adverse decision by the Supreme Court of Mississippi. The petition was granted June 16, 1947, — U. S. —, 67 Sup. Ct. 1736.

Official Report of the Opinion by the Supreme Court of Mississippi

A. H. Stone, Chairman, vs. Memphis Natural Gas Company, — Miss. —, 26 So. (2d) 268, February 24, 1947.

Jurisdiction

This Court has explicit authority to review by certiorari a final judgment in the highest court of a State

> "where is drawn in question . . . the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . ." 237 Judicial Code (b), 28 U. S. C. A., 344(b).

In this suit "a state court has decided a Federal question of substance . . . in a way probably not in accord with applicable decisions of this court." Supreme Court Rule 38, 5(a).

The Supreme Court of Mississippi decided that an undomesticated foreign corporation engaged in Mississippi exclusively in interstate commerce must pay Mississippi a tax for the privilege of engaging in such commerce. This violates the commerce clause of the Constitution.

The Federal question was presented to the State Tax Commission in the pleadings filed with the Commission (R. 5) and overruled. It was considered by the Circuit Court and sustained (R. 15). It was considered by the Supreme Court of Mississippi and overruled (R. 19).

The Supreme Court of Mississippi is the highest court of that State and the judgment entered against petitioner on February 24, 1947 is final (R. 22).

Statement of the Case

Petitioner was cited by the State Tax Commission of Mississippi to appear and show cause why it should not be required to pay the annual "franchise or excise" tax imposed by Chapter 121 of the 1934 Public Acts of Mississippi, page 204, as amended by Chapter 115 of the 1940 Public

Acts of Mississippi, page 105. The tax is $1.50 upon each $1,000.00 of capital used, invested or employed in Mississippi.

Petitioner filed with the State Tax Commission a comprehensive statement of the nature and scope of its business in Mississippi and alleged that the imposition of the tax violates constitutional immunities (R. 5). The Commission disagreed with petitioner and entered an order sustaining the tax liability (R. 4).

Petitioner appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi which reversed the Tax Commission and held petitioner not liable for the taxes as "petitioner is operating wholly and entirely in interstate commerce in the State of Mississippi, and not having qualified or domesticated, and seeking no franchise right or intrastate grant from the State" is not liable for such a tax (R. 16).

The Supreme Court of Mississippi reversed the Circuit Court and entered the final judgment in the approximate amount of $3,400.00 for each of the years 1942, 1943 and 1944 plus statutory interest at 1% per month (R. 22).

Petitioner is a Delaware corporation with general offices in Memphis, Tennessee. It owns and operates a pipe line extending from the gas fields in the vicinity of Monroe, Louisiana through the southeast corner of Arkansas, thence crosses the Mississippi River into Mississippi and extends north parallel with the Mississippi into Tennessee where the City of Memphis is its principal market. Map (R. 12).

A stipulation was made that all of the facts appearing in the petition filed by petitioner with the State Tax Commission are true (R. 13). The Supreme Court of Mississippi summarized in its opinion the undisputed facts.

> "Appellee, a Delaware corporation, owns and operates a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis in the State of Ten-

nessee and beyond. The pipe line enters Mississippi at a point a few miles south of Greenville, and runs thence, in this State, towards the north in a general direction parallel with the Mississippi River, and enters Tennessee at a point almost directly south of Memphis. The map of the line, made a part of the record, shows that there are approximately 135 miles of it in this State, and that the system includes two compressing stations at points in this State.

"There is a stipulation in the record covering the further facts, and these are that appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another state; that appellee company has not been domesticated or qualified as a foreign corporation with the right to do intrastate business; has no agent for service of process and has not had any such agent, and has maintained no office, in this State; and that it has no employees or representatives in this State other than those necessary to maintain the pipe line and its related facilities" (R. 19).

Petitioner pays to Mississippi *ad valorem* taxes amounting to approximately $82,000.00 a year (R. 14a) and also an income tax upon that part of its net income fairly attributable to activities in Mississippi.

State Tax Commission v. *Memphis Natural Gas Co.*, 197 Miss. 583 (10/9/44), certiorari denied 323 U. S. 682.

The Supreme Court of Mississippi held that:

"there is no attempt to tax interstate commerce as such"

which petitioner admits. The court then said that the petitioner is liable for the tax

"as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise manning the facilities of the system throughout the 135 miles of its line in this State."

In other words, the Supreme Court of Mississippi held that petitioner must pay a "franchise or excise" tax for the privilege of owning and maintaining in Mississippi facilities necessary to conduct an exclusively interstate business.

The Supreme Court of Mississippi justified its conclusion by resort to "trends" in judicial writing and, in substance, forecast that a long line of unbroken decisions of this Court are now to be ignored and heaved overboard. It cited no decisions of this Court to sustain its conclusions.

Admittedly petitioner is engaged in Mississippi solely in interstate commerce. It pays to Mississippi ad valorem and income taxes and thus contributes materially to the cost of local government. An undomesticated foreign corporation has the right to engage in Mississippi in interstate commerce without paying for the privilege as the privilege flows from the Commerce Clause of the Federal Constitution and may not be directly burdened by the imposition of a local "franchise or excise tax."

Assignment of Errors

I

The Supreme Court of Mississippi erred in holding that Mississippi can exact a franchise tax from an undomesticated foreign corporation for the privilege of doing solely interstate business because the imposition of the tax vio-

lates the Commerce Clause of the United States Constitution, Article I, Section 8.

II

The Supreme Court of Mississippi further erred in holding that petitioner's activities "in maintaining, keeping in repair, and otherwise in manning the facilities of the system" for interstate commerce are local activities which enable Mississippi to exact a privilege tax.

III

The Supreme Court of Mississippi further erred in basing its decision on a "trend" of the times and thus ignoring a long line of decisions of this Court that a state may not exact a tax for the privilege of carrying on interstate commerce.

IV.

The Supreme Court of Mississippi further erred in holding that it is permissible to exact this privilege tax from interstate commerce because a similar tax is exacted by Mississippi from its domestic corporations.

Brief and Argument

To a limited extent it has become the fashion for state courts to indulge in judicial prophecies, "trends" and forecasts by jumping at unwarranted legal conclusions and ignoring principles decided by this Court in long and unbroken lines of decisions. The Supreme Court of Mississippi cited not a single decision of this Court to justify its opinion as none are available. It stated that "more recently there has been a pronounced trend" to burden interstate commerce by "a tax as a recompense for the local protection afforded" if the effect is not "to interfere with the national interests." It further stated that the collection of this tax from petitioner is justified for protec-

tion of "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State."

This Court has repeatedly stated that such interstate properties may be burdened with ad valorem taxes, income taxes upon that part of the net income reasonably attributable to activities within the taxing State, and a proper part of the costs of enforcing police regulations. This Court has never said, however, that the States may go further and exact a toll for the right to use the facilities in interstate commerce.

Chapter 121 of the 1934 Public Acts of Mississippi, p. 204 as amended by Chapter 115 of the 1940 Public Acts of Mississippi, p. 105, imposes the "franchise or excise tax" upon both domestic and foreign corporations in such manner that there is no discrimination against foreign corporations. The only question involved is whether or not the tax violates the Commerce Clause.

The Act defines "doing business":

> "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."
>
> . . . . . .
>
> "Tax on Foreign Corporations. For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereinafter doing business within

this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

There are several recent decisions of this Court plainly manifesting the purpose of this Court to adhere to the principle that a state cannot tax the privilege of engaging in interstate commerce.

The invalidity of the tax can be demonstrated by reference to innumerable decisions of this Court. The Supreme Court of Mississippi made no mention of any of them though many of the leading cases on the subject were cited and discussed in petitioner's brief in the Supreme Court of Mississippi.

The great importance of the question here involved is emphasized in a recent decision of this Court.

Spector Motor Service v. *McLaughlin*, 323 U. S. 101.

Connecticut imposed on business within the state "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state . . ."

This court said:

"* * * Petitioner, a Missouri corporation with its principal place of business in Illinois, is engaged exclusively in the interstate trucking business. It is neither authorized by Connecticut to do intrastate trucking nor in fact does it engage in it. It maintains two leased terminals in Connecticut solely for the purpose of carrying on its interstate business. At the request of its lessor, it has filed with the Secretary of State in Connecticut a certificate of its incorporation

in Missouri, has designated an agent in Connecticut for service of process, and has paid the statutory fee."

The State Tax Commissioner decided that there was liability for the tax, and thereupon the taxpayer sought an injunction in the United States District Court, alleging that the tax offends provisions of the Commerce and Due Process Clauses of the United States Constitution.

This Court said:

"The District Court construed the statute to be 'a tax upon the exercise of a franchise to carry on intrastate commerce in the state' and therefore not applicable to the petitioner."

The Circuit Court of Appeals for the Second Circuit construed the statute to reach all corporations, whether engaged in intrastate or interstate commerce.

This Court said:

"* * *. It was conceded below that if the Connecticut tax was construed to cover petitioner it would run afoul the Commerce Clause, were this Court to adhere to what Judge Learned Hand called 'an unbroken line of decisions.' On the basis of what it deemed foreshadowing 'trends', the majority ventured the prophecy that this Court would change its course, and accordingly sustained the tax. In view of the far-reaching import of such a disposition by the Circuit Court of Appeals we brought the case here. 322 U. S. 720, 64 S. Ct. 1155.

"Once doubts purely local to the Constitution and laws of Connecticut are resolved against the petitioner there are at stake in this case questions of moment touching the taxing powers of the States and their relation to the overriding national interests embodied in the Commerce Clause. * * *

This Court further said:

"* * *. If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course

of constitutional history and 'an unbroken line of decisions' would indeed be brought into question."

"* * *. But even if the statute hits aspects of an exclusively interstate business, it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below."

The Circuit Court of Appeals was reversed and the suit remanded to the District Court with directions that the litigation be held "in the federal courts until definite determinations on local law are made by the state courts * * *."

The import of the decision plainly is that lower courts are not to be encouraged to guess and speculate about possible trends in the Supreme Court of the United States by departing from "an unbroken line of decisions" and sustaining a franchise tax for the privilege of doing exclusively interstate commerce, as such a tax violates "an unbroken line of decisions."

The attention of the Supreme Court of Mississippi was directed to

Freeman v. *Hewit*, 329 U. S. 249

in which this Court said:

"A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

* * * * * * *

"It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. *But it cannot aim to control that trade even though it desires to control its own.* It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce."

. . . . . .

"Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single taxworth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."

To offset the foregoing the only Federal case cited by the Supreme Court of Mississippi is:

Stone v. *Interstate Natural Gas Co.*, 103 F. 2d 544 (5 C.).

It was affirmed in

Interstate Natural Gas Co. v. *A. H. Stone, Commissioner*, 308 U. S. 522.

The entry was:

> "December 11, 1939. Per curiam. The judgment is affirmed. Southern Natural Gas Corporation *v.* State of Alabama, 301 U. S. 148."

The Supreme Court of Mississippi took the position that *Interstate Natural Gas Co.* v. *Stone* authorizes imposition of the tax upon petitioner, but such reasoning is erroneous. The suit involved this same Mississippi franchise statute. Interstate, also a natural gas pipe line extending from Louisiana to and through Mississippi, was held liable for the tax because, as emphasized in the opinion:

> "As a foreign corporation it filed with the Secretary of State under other statutes as a prerequisite to doing business in Mississippi a copy of its charter, and paid a required fee of $500, and appointed an agent for service of process."

The Court said the effect of doing these things is that:

> "When this Gas Company, though it did not domesticate, filed its charter and appointed its agent for service in order to qualify for doing business in the old sense, it began the enjoyment in Mississippi of a privilege incident to its corporate organization, it began to 'do business' in the new and artificial sense."

If a corporation elects to enter a State and seek a local privilege, it must pay therefor and cannot avoid the tax on the ground that the greater part of its business is interstate. The election to either do or seek the privilege of doing a very trifling amount of local business is adequate to sustain the privilege tax.

In this case of *Stone* v. *Interstate Natural Gas Company* the court has above twice emphasized the effect of the foreign corporation filing its charter, appointing a process agent and paying $500.00 for the privilege of local business.

To be certain that the reader clearly understands the basis for the decision, the court tells the reader a third time about the effect of filing the charter and naming an agent for service of process. The court said:

> "By the Legislature's queer definition, a foreign corporation formed for profit is doing business in Mississippi and is taxable as soon as it gets ready to be active by having property there and enjoying the protection of the State for it, and qualifies formally by filing its charter and naming its agent for process service. *These latter acts clearly mark its appearance in the State.*"

The court reemphasizes the controlling point for a fourth time:

> "The charter which the Gas Company filed and obtained the right to enjoy in Mississippi grants to it power to do much more than to engage in the interstate transportation of gas and oil."

In its simplest form, Interstate was liable for the tax because it chose to file in Mississippi its charter and thereby secured the right to do a local business.

This Court refused certiorari in the *Interstate* case on the strength of the following case in which the foreign pipe line corporation also qualified to do intrastate business:

> *Southern Natural Gas Corporation v. Alabama*, 301 U. S. 148.

Mr. Chief Justice Hughes stated:

> "Appellant was organized prior to May 12, 1928, under the laws of Delaware and on that date it qualified to do business in Alabama. It named a statutory agent and filed in the office of the Secretary of State a copy of its charter which covers a wide range of activities. It has paid annually the required permit fee. At the

time of the assessment in question appellant maintained its office and chief place of business in the city of Birmingham, Ala. The entire management, control, and conduct of its business was conducted from that office."

* * * * * * * * *

"By compliance with the statute appellant obtained the privilege of engaging within the State in any of the activities which its charter authorized."

* * * * * * * * *

"From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana, it appears that appellant carried on in Alabama activities of an intrastate character."

In addition to the foregoing activities, this Court pointed out that Southern Natural Gas Corporation actually distributed gas in Alabama which is intrastate business. It necessarily follows for a number of reasons that it was liable for the franchise taxes. It is obvious that *Stone* v. *Interstate Natural Gas Co.*, affirmed on the strength of *Southern Natural Gas Corporation* v. *Alabama*, was correctly decided because, as stated in *Stone* v. *Interstate Natural Gas Co.*, the pipe line corporation qualified in Mississippi

"formally by filing its charter and naming its agent for service of process. These latter acts clearly mark its appearance in the State."

Petitioner, Memphis Natural Gas Company, has not done these things and the decision is therefore not applicable to it and has been erroneously applied.

Another very recent case sustaining the principle that a tax may not be exacted for the privilege of doing interstate business is:

Joseph v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422.

The City of New York imposed an excise tax measured by gross receipts for the privilege of carrying on business in the city. The taxpayer was engaged exclusively in stevedoring business, which this court found to be exclusively interstate and therefore held the tax uncollectible as an unconstitutional burden on interstate commerce.

This court pointed out that the taxpayer contributed materially to the cost of local government by payment of "the general income and ad valorem taxes of the State and City of New York."

> " • • •. As the power lies in Congress under the Clause to make any desired adjustment in the taxation area, its acquiescence in our former rulings on state taxation indicates its agreement with the adjustments of the competing interests of commerce and necessary state revenues. There is another reason that may be the basis for the acceptance, almost complete, by Congress of the judicial interpretations in this field. This is that a wide latitude exists for permissible state taxation. This term, in an effort to show that the reach of the Circuit Court (commerce clause?) did not destroy the state's power to make commerce pay its way, we elaborated the fact that taxes on the commerce itself was not the sole source of state revenue from that commerce. Freeman *v.* Hewit, supra, p. 5; see also Adams Mfg. Co. *v.* Storen, supra, 310." (Our parenthetical insertion).

When discussing the several types of lawful taxation available to the states, this court said:

> "• • •. When we examine the Berwind-White tax on the purchasers of tangible personal property

for consumption, there is the same reliance upon the local character of the sale, 309 U. S. at pages 43, 47, 49, 58, 60 S. Ct. at pages 390, 392, 393, 394, 398, 84 L. Ed. 565, 128 A. L. R. 876. We there said, 309 U. S. at page 48, 60 S. Ct. at page 393, 84 L. Ed. 565, 128 A. L. R. 876:

"'Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or *impose a levy for the privilege of doing it,* or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey.'" (Our emphasis).

Crutcher v. *Kentucky,* 141 U. S. 47, 57.

The court said:

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. • • • We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In other words, Mississippi grants no privilege to a corporation engaged exclusively in interstate commerce because the privilege flows from the Federal Government. The State has no control over such a privilege and is

therefore unable to lawfully tax it. A very different situation results where such a foreign corporation seeks the privilege of doing intrastate business by filing its charter, appointing an agent for service of process or doing some other similar act indicating the desire to have the privilege of local business. When a foreign corporation engaged not only in interstate commerce but also having sought the privilege of local business resists liability for a privilege tax, the courts uniformly hold that such foreign corporation is liable because it sought and had the right to do a local business. Such is the decision in *Stone* v. *Interstate Natural Gas Co., supra.*

Ozark Pipe Line Corporation v. *Monier*, 266 U. S. 555.

This case is precisely in point. The pipe line company was a Maryland corporation. It operated a pipe line from Oklahoma through Missouri to Illinois. It maintained in Missouri two general offices. Missouri attempted to collect a franchise tax. The court held that the tax could not be sustained as the pipe line company was engaged in Missouri in nothing but interstate commerce. The court said:

> "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive, or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and ex-

tends to whatever is necessary to the complete enjoyment of the right protected. Heyman *v.* Hays, supra, page 186 (35 S. Ct. 403)."

In the following comparatively recent case the doctrine stated in Ozark Pipe Line Corporation, *supra*, was approved without the slightest reservation.

Southern Pacific R. R. v. *Gallagher*, 306 U. S. 167.

On page 179 the court said when speaking of *Ozark Pipe Line Corporation* v. *Monier:*

"The tax was forbidden because on the privilege of *doing an exclusively interstate business.*"

On page 180 the court said:

"The language just quoted shows that this court interpreted the transactions in Missouri as merely a part of the interstate commerce and *the tax on the franchise* an interference therewith *because a tax directly upon it.* '• • • nothing was done in Missouri except in furthrance of transportation.' It was this conclusion of the court on the factual situation which brought about the Ozark decision. Where there is also intrastate activity, an apportioned State franchise tax on foreign corporations doing an interstate business is upheld. Southern Natural Gas Corp. *v.* Ala., 301 U. S. 148 155. A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid. Atlantic Lumber Co. *v.* Commissioner, 298 U. S. 553, 556."

The foregoing states and positively admonishes that some intrastate business must be done before the State can demand a privilege tax from a foreign corporation doing interstate business.

Murdock v. *Pennsylvania*, 319 U. S. 105.

"A state may not impose a charge for the enjoyment of a right granted by the federal constitution.

Thus it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick *v.* Berwind-White, 309 U. S. 33, 56-58), although it may tax the property used in, or the income derived from that commerce so long as those taxes are not discriminatory."

Illinois Gas Co. v. *Public Service Co.*, 314 U. S. 498.

The court said:

"In applying this mechanical test for determining when interstate commerce ends and intrastate commerce begins this Court has held that the interstate transportation and the sale of gas at wholesale to local distributing companies is not subject to state control of rates, Missouri *v.* Kansas Gas Co., *supra;* see Public Utilities Commission *v.* Landon, *supra*, 245; cf. Public Utilities Commission *v.* Attleboro Co., 273 U. S. 83, 89, or to a state privilege tax, State Tax Commission *v.* Gas Company, *supra.*"

The case cited in the last line, supra, originated in Mississippi.

State Tax Commission v. *Gas Company*, 248 U. S. 41.

The Gas Company operated a pipe line extending from the gas field in Louisiana into Mississippi, where it sold gas at wholesale to several distributing companies. Mississippi attempted to exact a privilege tax. The court said:

"Distributing companies tap the plaintiff's pipes near Natchez in the town of Woodville. The gas withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff, which is the only way in which it can be measured. The pressure of the gas is reduced by the plaintiff before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help deliver it and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi. The

plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it by retail. Mo. *v.* Kan. Gas Co., 265 U. S. 298, Public Utilities Comm. *v.* Landon, 249 U. S. 236, 245, Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555."

The court decided that the Mississippi privilege tax could not be collected.

Dahnke-Walker Milling Company v. *Bondurant*, 275 U. S. 282.

"A corporation of one state may go into another without obtaining the leave or license of the latter for all the legitimate purposes of interstate commerce, and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause of the Federal Constitution.

"The commerce clause of the Constitution expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter.

"Thus it was said in Welton *v.* Missouri; 91 U. S. 275, 280, 23 L. Ed. 347, 349; 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities."

"For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the state of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was, as to that transaction, invalid because repugnant to the commerce clause."

Cheney Brother Co. v. *Massachusetts*, 246 U. S. 147.

A Massachusetts statute imposed an annual excise tax on every foreign corporation doing business within the State

of 1/50 of 1% of the par value of the authorized capital stock.

The corporation had an office in Massachusetts with salesmen who solicited orders subject to acceptance by the home office in Connecticut. It was held that the corporation was not subject to the tax. The court said:

> "The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from State taxation."

The court also said:

> "We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the Commerce Clause."
>
> *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203.

Massachusetts levied an excise tax:

> "Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of * * * two and one half (2½%) per cent of that part of its net income * * * which it derived from business carried on within the commonwealth."

The taxpayer was incorporated in New Jersey, but it maintained an office in Boston.

> "in charge of a district sales manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England states are conducted. The office is used as headquarters for traveling salesmen, who solicit orders in Massachusetts and the other New England states."

Orders taken were sent to the principal office of the taxpayer located in Pennsylvania, and the cement was shipped from factories which were located outside of Massachusetts.

The court said on page 211:

> "It is rightly conceded by the Attorney General that the petitioner was engaged in this commonwealth exclusively in interstate commerce."

Also:

> "The right to lay taxes on taxable property or on income is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of those factors—the proportion of the value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?
>
> "Cheney Bros. Co. *v.* Mass., 246 U. S. 147, 153, 154, necessitates a negative reply. Under St. 1909, c. 490, Part III, Par. 56, the State demanded an excise of a foreign corporation which transacted therein only interstate business. The excise was laid upon the corporation and the basis of it the same as in the present cause. This court said: 'We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause.' Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount. Looney *v.* Crane, 245 U. S. 178, 190; International Paper Co. *v.* Mass., 246 U. S. 135, 142; Heisler *v.* Thomas Colliery Co., 260 U. S. 245, 249; Texas Transport & Terminal Co. *v.* New Orleans, 264 U. S. 150."

The court also said on page 219:

"The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Bros. Co. *v.* Mass., and cannot be enforced against a foreign corporation which does nothing but interstate business within the state. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden."

Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384.

Plaintiff, a Colorado corporation operating a statewide telephone system in Montana, contested the Montana act imposing a license tax on all telephone instruments used in the state. As the telephones were used for both intra and interstate purposes, the court held that the privilege tax being indivisible and indiscriminate in its application "necessarily burdens interstate commerce," and said:

"But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it."

* * * * * * *

"* * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. Sprout *v.* South Bend, Inc., 277 U. S. 163, 171, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 51 S. Ct. 499, 75 L. Ed. 1171."

Matson Navigation Co. v. *State Board*, 297 U. S. 441.

California imposed a franchise tax upon every corporation exercising its corporate franchises within the State. The tax was measured by net income. The statute provided that if all the corporation's business was done in California, the tax would be computed on the entire net income; if not, on that portion derived from business attributable to activities in California.

The State assessed a tax of 4% on the entire net income from intrastate business and also a like tax on that part of the net income from interstate and foreign commerce attributable to California. The corporation was incorporated under the laws of California. The court held that the corporation was liable for the tax upon its entire intrastate business and also upon that part of the net income from interstate business fairly attributable to California. While the court held that the tax, as applied to the corporation to the extent stated, was valid, the court made this very interesting statement:

> "A foreign corporation whose sole business in California is foreign and interstate commerce cannot be subjected to the tax in question. Alpha Cement Co. *v.* Massachusetts, 268 U. S. 203; Anglo-Chilean Nitrate Co. *v.* Alabama, 288 U. S. 218."
>
> *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335.

> "* * * Of course, no State can tax the privilege of doing interstate business. See Western Live Stock *v.* Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A.L.R. 944. That is within the protection of the Commerce Clause and subject to the power of Congress."

We respectfully submit that the Supreme Court of Mississippi has gravely erred and that Mississippi cannot law-

fully exact from petitioner a tax for the privilege of engaging exclusively in interstate commerce.

Respectfully submitted,

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(2915)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 94

MEMPHIS NATURAL GAS COMPANY, PETITIONER,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI, RESPONDENT

BRIEF ON BEHALF OF THE RESPONDENT

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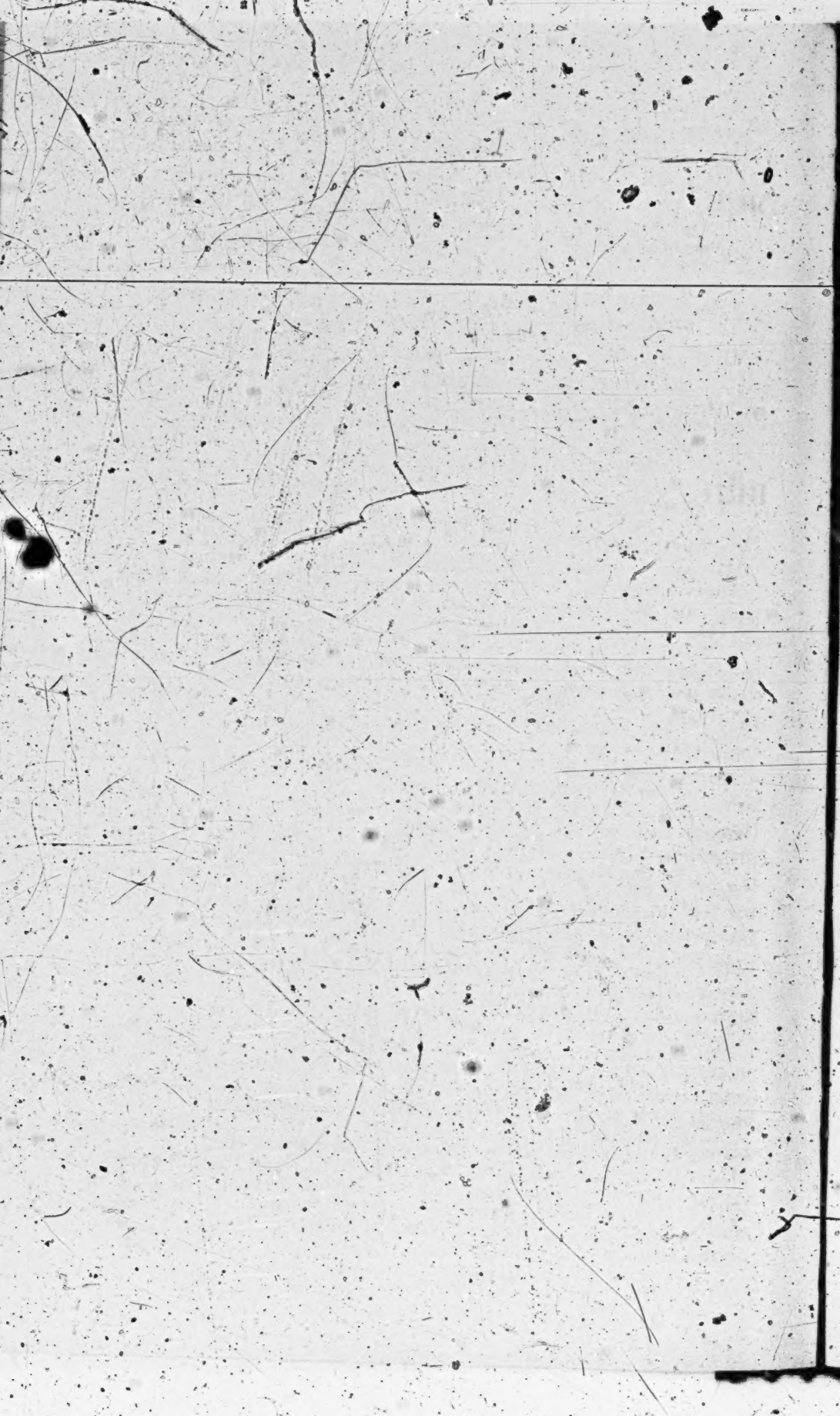

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BRIEF ON BEHALF OF THE RESPONDENT

STATEMENT OF THE CASE

This case comes from the Supreme Court of Mississippi by certiorari, granted by this Court on June 16, 1947. A petition for certiorari was filed on May 17, 1947, based upon a final judgment rendered against petitioner herein by the Supreme Court of Mississippi, rendered on the 24th day of February, 1947, same appearing as Fol. 32 on pages 19, 20, 21 and 22 of the printed record, reported in 29 So. Rep. 2D, 269.

All of the proceedings out of which this controversy grew were disclosed by the printed record beginning on page 1 thereof and continuing through and including page 11 of the printed record. Included in said record of the proceedings is the order of the State Tax Commission adjudicating liability for the tax in question, same appearing on pages 4 and 5 of the printed record. And immediately following said order, there appears a petition of the petitioner to the Mississippi State Tax Commission, and the hearing on said petition resulted in the order of the Commission previously referred to.

On pages 1 to 4, both inclusive, appears the pleading filed in the Circuit Court of Hinds County, Mississippi, filed by the petitioner in the nature of an appeal from the final order of the State Tax Commission. But since under the proceeding provided by statute, no reply of any kind was required to be filed by the Commissioner, the statute requiring that the record of the proceedings before the Tax Commision should constitute the record upon which the case should be heard in the Circuit Court, and therefore, no further pleading ap-

pears in the record other than the stipulation appearing on pages 13 and 14 of the printed record.

ARGUMENT

Section 9314 of the Code of Mississippi for 1942 provides as follows:

> "For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

Section 9312 of the Code of Mississippi for 1942 defines "doing bsuienss" as follows:

> "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

The contention relied upon by the petitioner herein, before the Tax Commission, the Circuit Court of Hinds County, and the Supreme Court of Mississippi was that because the appellant being a foreign corporation and engaged exclusively in interstate commerce, over which the State has no control, that unless the appellant saw fit to obtain permission to do an intrastate business that there was no authority of the Legislature of Mississippi to impose or demand any tribute

for the protection it afforded to the valuable property owned in Mississippi in a corporate capacity, regardless of the activity defined by the statute which would constitute "doing business" in contemplation of the law by which the tax was imposed.

In answer to this contention on the part of the petitioner, I desire to review for the benefit of this Court the history and basis of the legislation by which the tax is imposed by the law under consideration:

Section 199 of the Constitution of Mississippi defines the term "corporation" as follows:

> "The term 'corporation' used in this article shall include all associations and all joint stock companies for pecuniary gain having privileges not possessed by individuals or partnerships."

Franchise taxes are generally accepted as applying only to some form of organization which distinguishes it from an individual citizen. And in most text books, it is defined as one of the several forms of taxation to which corporations may be subjected.

In Cooley on Taxation, Fourth Edition, which is one of the oldest and highly regarded authorities on the general subject of taxation, in Section 826 of Volume 2, under the general heading "Taxation of Corporations" the following definition of Franchise Tax appears:

> "What are Franchise Taxes. The term 'franchise tax,' as generally used, has no definite legal meaning. It may mean either an excise or property tax. Generally, however, the term is used as meaning an excise, as distinguished from a property tax, imposed on franchises and consisting of a more or less arbitrary sum having little or no connection with the actual value, although such a tax, even when an excise, is often measured, at least to some extent, by the amount of property or earnings of the corporation."

Franchises are likewise divided into two classes, said classification being set out in the same work as Section 827 of said Volume, as follows:

> "Kinds of franchises. Franchises are of three kinds as follows: 1. The franchise 'to be,' which is the grant

of corporate life from the state. The right to exist as a corporation is a franchise. This is often designated as the 'corporate' franchise, and is sometimes referred to as the 'creative' franchise. The corporate franchise, i. e., the franchise to be a corporation, is the privilege that individuals possess to act as one, with legal individuality and immortality, and with divisible share capital."

In the same Section the two divisions of franchise are distinguished, the one being the right "to be," and the next distinction is the one defining the franchise as she right "to do." And it is generally recognized by all of the authorities, that a sovereign state can regard its domestic corporations as possessing a franchise or right merely to exist as such, and a sovereign state likewise has a corresponding right to impose a tax for the right or privilege "to do" upon any organization which owes its existence to the authority of some other state.

There are literally hundreds of cases in the books in which the various statutes of the several states have been construed as applied to the term "doing business." The cases are about equally divided in holding that some activities of foreign corporations are "doing business" in contemplation of the statute involved, and there are perhaps an equal number of cases in which it has been held that foreign corporations were not "doing business" in states in contemplation of the statutes of the state, being construed.

It is a positive fact that in all cases where the Courts have held that the activities of foreign corporations did not constitute "doing business," it was by reason of the fact that the statute being construed was not susceptible of a construction which would impose a tax on the activity of such foreign corporations within said state.

Reviewing all of the cases on this subject where it is manifest that it depends upon the wording of the statute as to whether or not the activities under consideration were held to be sufficient to bring the foreign corporation within the terms of the statute, there was an implication that the states could adopt their own definition of what constituted "doing business" in contemplation of the statute imposing a franchise tax on a foreign corporation .

It would appear therefore that unless the legislature in

enacting a statute had exercised the privilege of defining the term "doing business" that the conventional definition laid down by the Courts in the absence of a statutory definition, to be "the pursuit to a considerable extent of the purpose for which the corporation was organized."

The original Franchise Tax Law of Mississippi, being Article 3 of Chapter 100 of the Code of 1930, Chapter 89, Mississippi Laws 1930, did not define the term "doing business." And as a consequence the Courts construed the original Mississippi Franchise Tax Law as imposing a tax only on foreign corporations which engaged in activities within the State of Mississippi which were in pursuit of the principal purpose for which the corporation was organized.

In the early case of Home Insurance Company vs. New York State, reported 134 United States, 594, the Supreme Court of the United States held that a state in granting the right or privilege to be a corporation to its own creature, or granting a right or privilege to a foreign corporation to engage in any corporate activity within the state, could impose any condition as its legislature might judge most benefitting to its interest and policy, and require as a condition to the grant of the right "to be" to a domestic corporation, or the right "to do" to a foreign corporation, on any terms that it might see fit to adopt. And that such condition imposed either upon its own creature, or a foreign corporation was wholly within the discretion of the legislature of such state and was not a subject of inquiry by the Courts "however arbitrary or capricious." Such matters resting solely within the legislative discretion.

Fortified with the knowledge of the fact that it had the right to define the term "doing business" as contemplated by any statute it might enact by which tribute was demanded of a foreign corporation which might seek protection of the laws and government of Mississippi by coming into the state and investing its capital in tangible property located within the state, the legislature of Mississippi enacted Chapter 121 of the Laws of 1934, and defined the term "doing business" as contemplated by said act in the following language:

> "When the term 'doing business' is used in this act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident

to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

By Section 2 of said Act a tax was imposed upon all domestic corporations which might be created under the laws of Mississippi, for the mere privilege of existing as a corporation within the state, the language of said Section being as follows:

> "There is hereby imposed, to be paid and collected as hereinafter provided, a franchise or excise tax upon every corporation, association, or joint stock company for pecuniary gain, having privileges not possessed by individuals, and having capital stock represented by shares, now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to $1.00 for each $1,000.00, or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the State of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence." (This section was amended by Chapter 115, Laws of 1940, by increasing the rate of taxation to $1.50 per thousand).

In order that foreign corporations which might come into the state and enjoy the benefit and protection of the laws of the state in the ownership of property acquired and owned in the state, which ownership and use might be enjoyed under the protection of the laws and government of the state, and in order to treat the foreign corporation in exactly the same manner as the domestic corporation provided by Section 3 of said act, as follows:

> "For the year 1934 and annually thereafter, there shall be and is hereby, imposed, levied and assessed upon every corporation, association, or joint stock company, as hereinbefore defined, organized and existing under and by

virtue of the laws of some other state, territory, or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.00 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state." (This section was amended by Chapter 115, Laws of 1940, by increasing the rate of taxation to $1.50 per thousand).

The legislature then provided by Section 6 of the Act (Section 9317 of the Code of 1942), the basis for computing the tax, in the following language:

"The tax imposed, levied and assessed, under the provisions of this act, shall be calculated on the basis of the value of the capital employed in this state for the year preceding the date of filing the return, whether a calendar year, or fiscal year, except where otherwise provided in this act, measured by the combined issued and outstanding capital stock, surplus and undivided profits."

Then follows detailed instructions for determining the value of capital, surplus, and undivided profits as contemplated by the provision quoted. But in order to insure a basis for requiring something from an organization not employing its capital in the state in a manner that would justify the imposition of a tax computed according to its capital, an alternative basis for computing the tax is provided by the following language of the same section:

"But in no case shall the franchise tax so computed be less than ten dollars for the period covering which the return is filed. In no case shall the determined capital in Mississippi be less than the assessed value of the real estate and tangible personal property in Mississippi for the year covering which the return is due."

These provisions apply alike to both domestic and foreign corporations. But in order to emphasize the fact that tribute shall be exacted from foreign corporations for the mere right

to enjoy the privilege of ownership of tangible property within the state in a corporate capacity, under "the benefit and protection of the government and laws of the state," provided in Section 8 of the law, (Section 9319 of the Code of 1942), an alternative method for determining the amount of tax due, when the several elements of which a comparison is to be made, are lacking, providing as follows:

> "Provided, however, that the amount of determined capital in Mississippi shall in no case be less than the assessed value of the property of the organization in Mississippi for the year covering which return is made."

It is manifest that the legislature in the enactment of the statute under consideration, intended to impose a tax for revenue purposes upon the mere privilege of exercising any of its corporate powers in Mississippi, by foreign corporations. And this is true, even though the only corporate power exercised or enjoyed in the State was the ownership of tangible property in a corporate capacity.

It was contended by attorneys for the petitioner in the lower Court, and will no doubt be contended in this Court, that when the state exacted and collected ad valorem taxes on the assessed value of the tangible property owned within the state, that the state exhausted its authority to impose other taxes computed on the basis of the value of such property.

This contention is positively answered in the negative by the rule announced and subscribed to by the Court in the case of Louisiana ex rel, vs. Hunt, 182 La. 1073, 162 So. 777, 103 A. L. R. 9, in the annotation to which in 103 A. L. R. at page 21, the rule is stated in the following language:

> "Nor does the fact that an occupaiton tax is levied upon an ad valorem basis render it any the less an occupation tax. This method is quite frequently adopted, and in some cases might be the most just and reasonable measure for such a tax. Both kinds of taxes may be levied upon the same property, and both be levied upon an ad valorem basis, and both be valid."

As further authority in answer to the contention of the petitioner that because ad valorem taxes are imposed by the State on its tangible property situated in Mississippi, that the

state would have no right to impose an additional tax, which might be computed on the basis of the value of the property, I call the Court's attention to the provisions of Section 232 of Volume 1, Cooley on Taxation, Fourth Edition, which reads as follows:

> "It is a settled rule that it is not double taxation to impose an ad valorem tax on property used in a business and also to impose a license tax on the business or the use of the property. This rule applies equally well to taxation of corporations. Both a license or franchise tax and a tax on the property may be imposed."

Cited in support of this text are many cases from the Supreme Court of the United States,—Alabama, Florida, Kentucky, Louisiana, Massachusetts, Missouri, New Mexico, Vermont, Virginia, and the State of Washington.

In Section 243 of the same Volume of Cooley on Taxation, appears this additional language:

> "As already noted, there is no obnoxious double taxation because of the imposition of both a property and a license or occupation tax; and the same is true as to a tax on the property of a corporation and a franchise tax, where the franchise tax is not a property tax or in lieu of a property tax."

Cited in support of the last quoted text are numerous cases from the Supreme Court of the United States, — California, Kentucky, Maryland, Massachusetts, Nebraska, New York, North Carolina and Pennsylvania. And it will thus be seen that the Courts of practically all States in the Union, as well as the Supreme Court of the United States have subscribed to this rule in every instance where the question has been presented.

In answer to the anticipated contention of the attorneys for the petitioner that so long as his corporation elected to do only an interstate business, that the State of Mississippi had no right to impose a franchise tax on its acts in a corporate capacity, I call the attention of the Court to the early case of Bank of California v. City and County of San Francisco ,decided by the Supreme Court of California February 18, 1904, and reported in 75 Pac. Reporter, at page 832.

The question presented to the Court in said case which is

analogous to the question presented by the petitioner was whether or not the right to do a banking business which belonged to all citizens, could be regarded as a privilege granted by the sovereign in which the business was sought to be conducted. The Court in deciding this question used the following language:

> "While the right to do a banking business is not a franchise and belongs to all citizens generally, yet the right to carry on such business through the agency of a corporation is a franchise dependent on a grant of corporate powers by the State."

This language of the Court is directly applicable to the question raised by the petitioner. The petitioner's contention being that the right to do an interstate business was a right over which a sovereign State would have no control. And hence, so long as the petitioner elected to do only an interstate business, that the State could not grant any right or privilege which would justify the imposition of a tax, even though the interstate business was conducted by use of tangible property situated in the State.

This Court has had occasion to construe the law under consideration with reference to the exact question presented by this case, this identical law as applied to another corporation engaged in exactly the same kind of business in the same way in the State has been construed by the Federal Courts, including the District Court, the Circuit Court of Appeals and the Supreme Court of the United States. In the case of Stone v. Interstate Natural Gas Company, reported 103 Fed. 2nd., 549, the Circuit Court of Appeals of the Fifth Circuit had before it a proper construction of the identical law, the litigation involving the validity and application of this identical law to the operations of the Interstate Natural Gas Company in Mississippi, which company was engaged in the identical kind of business in the same manner as the petitioners in this case.

The Interstate Natural Gas Company, the appellee in said case, had successfully resisted the efforts of the Mississippi authorities to collect taxes on its interstate business. And had procured, through a three-judge Federal Court, an injunction, which was affirmed and made permanent by the Supreme Court of the United States.

The decision of the Court was no doubt correct in the light

of the statute which was construed in said case. The statute seeking to impose a franchise tax on a foreign corporation merely contained language defining the activity taxed under said law as "a franchise tax upon every corporation doing business in the State of Mississippi, not herein specifically exempted."

In the absence of any explanatory language indicating the privilege sought to be taxed, the Courts applied the conventional definition "the pursuit to a considerable extent within the State of the principal purpose for which the corporation was formed." And since said company admittedly did only an interstate business, the Courts held that the tax could not be imposed on such activity, under a statute which did not contain any definition nor explanation of the character of activity that the State might select as a basis for imposition of the tax.

In an effort to enact a statute under the terms of which revenue might be derived from the Interstate Natural Gas Company, and other foreign corporations similarly situated, the Legislature in 1934 enacted Chapter 121, Laws of 1934, the same being the Franchise Tax Law now in force in Mississippi.

In the preparation of the bill which was finally enacted, the framer of the bill after exhaustive study of the question, determined that the right of the State to impose the tax upon foreign corporations might be based solely on the protection that the government and laws of the State afforded, the foreign corporations owning property in the State, and relying upon the announcement of the Supreme Court of the United States in the early case of Home Insurance Company v. New York State, 134 U. S. 594, found that said Court in said case, announced the following rule:

> "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the dis-

cretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a federal tribunal. As was said in Delaware Railroad Tax Case, 18 Wall. 206, 231: 'The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' It is true, as said by this Court in California v. Pacific Railroad Co., 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created

by the amount exacted, the remedy must be sought by appeal to the legislature of the State; it cannot be furnished by the federal tribunals."

Fortified by the language of said decision, and particularly that portion which stated in effect that a State may impose such conditions as it saw fit upon a foreign corporation which came into the State with its property, and that the method and basis of taxation was not a subject of inquiry by the Courts no matter how arbitrary or capricious, provided by Section 1 of said Chapter 121, Laws of 1934, the definition of what constituted doing business in the State, which would be used as a basis for imposing a tax upon foreign corporations, said definition being as follows:

"When the term 'doing business' is used in this act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

In full explanation of the fact that this tax would be imposed upon the mere privilege of owning property in Mississippi in a corporate capacity, even though no other activity of the foreign corporations within the State could be classed as doing business, in Section 3 of said Chapter 121, Laws of 1934, the Section by which taxes were imposed on foreign corporations, explained the purpose and the basis of said tax in the following language:

"It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

The act in question having been drawn for the express purpose and being designed through the definition of doing business, and the explanation of the basis for imposing the tax, to overcome the objection to the original law under which the Interstate Natural Gas Company had succeeded in establishing its immunity from any taxes imposed by the State,

or any of its corporate activities, a test was immediately made of the new law by a demand made upon the Interstate Natural Gas Company for a franchise tax alleged to be due under the new law because of its specific provisions with reference to the basis of imposition of the tax. The Interstate Natural Gas Company, desiring to be cooperative in the matter, paid the tax demanded but filed suit for recovery thereof in the District Court of the United States. And the District Court awarded judgment to the plaintiff and allowed recovery of the taxes paid, whereupon the case was appealed to the Circuit Court of Appeals of the Fifth Circuit, where the case was tried, resulting in reversal of the judgment of the United States District Court and holding that said Company was liable for the tax, and therefore not entitled to recovery of same.

In the reported case in 103 Federal 2nd, Judge Sibley of the Circuit Court of Appeals wrote a very comprehensive and lengthy opinion, in which he discussed at length several questions raised as to the validity of the statute, and its application to the said Interstate Natural Gas Company, whose status insofar as the conduct of its business was concerned was identical with its status at the time when it had procured injunctions restraining collections of the several taxes hereinbefore mentioned.

The former injunction and decision of the three-judge Court was invoked in support of the suit by the Gas Company, but Judge Sibley, in his opinion, differentiated the two cases, pointing out the difference in the provisions of the two statutes involved, and holding that the former decision and injunction could not be depended upon for establishing immunity from the tax. He then entered into a lengthy discussion of the new statute and the language of said opinion is quoted here at length as applied to the new statute and a proper construction thereof:

> "We come thus to interpret the Act of 1934 and to determine whether it may be applied to this Gas Company. The Supreme Court of Mississippi has not construed it or its predecessor of 1930; so we must make our own construction. Chapter 89 of the Acts of 1930 (Code of Mississippi of 1930, Chapt. 4199), which the

present Act repealed, levied a 'franchise tax upon every corporation doing business in the State of Mississippi, not herein specifically exempted. Such tax shall be a tax for the continuance of enjoyment of all rights granted corporation under the corporate form of existence, if incorporated under the laws of this state, or by reason of any act of domestication, if incorporated under the laws of another state.' **'Doing business 'was not defined, and probably meant that a corporation was not subject to the tax unless or until it carrried on an active business of the k'rd named in its charter.** So also a foreign corporation might be supposed not subject if it merely qualified to 'do business' by filing copy of its charter with the Secretary of State under Chap. 4164 and appointed an agent for service under Chap. 4140, but did not become 'doesticated' under Chaps. 4161 and 4162. The Act of 1934 does not confine itself to corporations. But (Sect. 1) extends to associations, joint stock companies and 'every form of organization for pecuniary gain, having capital stock represented by shares, ... having privileges not possessed by individuals or partnerships.' . . . . 'Doing business' . . . shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization.' There is imposed (Sect. 2) an annual 'franchise tax or excise tax' upon each such organization existing in this State or hereafter organized under its laws. The same tax (Sect. 3) is then imposed on every such organization organized and existing by virtue of the laws of some other State or country 'now, or hereafter doing business within this state, as **hereinbefore defined.**' As to each class of organizations the tax is $1 per thousand dollars of 'capital used, invested or employed . . . . within this state,' and it is explained that the tax is required in the case of domestic organizations 'for the right granted by the laws of this state to exist as such organization, and enjoy under the protection of the laws . . . the powers, rights, privileges,' etc., Section 2, and in the case of foreign organizations for 'the benefit and protection of the government and

laws of the state received by the capital which measures the tax. Section 3. Payment of the tax is made a condition precedent to the continued existence of domestic organizations and 'to the right to continue business in this state if not organized under the laws of Mississippi.' Section 4. 'Continue business' we construe to mean 'continue to do business' in the new sense. There is a formula for measuring the tax to be paid which may not always be the assessed value of the property owned in the State, but the latter is the measure in the present case.

We think the tax is laid on a domestic organization because of its mere existence capitalized and ready to carry on its corporate activities. It need not do anything to incur it. The capital which is to measure the tax need not be actively employed, for the words are 'used, invested or employed;' and the declaration is that the tax is payment for the mere right to exist and enjoy protection. In order to treat the foreign organization in as nearly the same manner as possible, the tax is applied to it so soon as it 'does business' in the State. Under the common and natural meaning of these words a commercial activity would be understood, but the Legislature assigns a very artificial meaning to them, which includes not only any and every corporate act, but the exercise or enjoyment in the State of any power or privilege acquired by virtue of being so organized. The privilege and power of a corporation to sue and be sued, **or even to acquire and hold property as such,** are included. When this Gas Company, though it did not domesticate, filed its charter and appointed its agent for service in order to qualify for doing business in the old sense, it began the enjoyment in Mississippi of a privilege incident to its corporate organization, it began to 'do business' in the new and artificial sense. It already had, we suppose, when the Act was passed its pipe and telephone lines, and so did not acquire them in Mississippi during the tax years, but it must have employed and used agents to maintain them. Without putting any gas through the pipes this corporate

activity would go on. By the Legislature's queer definition, a foreign corporation formed for profit is doing business in Mississippi and is taxable so soon as it gets ready to be active by having property there and enjoying the protection of the State for it . . . . Thus both foreign and domestic corporations, though intending to do and actually doing no active business in the common sense except what is foreign or interstate commerce, are taxed, but are not taxed because they carry on such commerce. . . . This franchise or privilege tax is not escaped because the Gas Company chose only to transport and sell gas interstate. It owes no more tax because it did that. Therefore that activity is not taxed.

"The tax is laid equally on a domestic and foreign business corporation, and laid alike on either whether it carries on interstate commerce or not. There is no discrimination against foreign corporations or against interstate commerce. The tax is not on its face burdensome or oppressive, and is not shown to be so in its operation. It is evidently a tax for revenue and not designed to regulate either corporations or commerce. Therefore Stone contends that it is enforceable notwithstanding the Gas Company has in fact done no business in Mississippi except interstate commerce; pointing especially to Detroit International Bridge Co. v. Corp. Tax Board, 287 U. S. 295, 53 S. Ct. 137, 77 L. Ed. 314; Southern Natural Gas Corp. v. State, 301 U. S. 148, 57, S. Ct. 696, 81 L. Ed. 970; Id., 233 Ala. 81, 170 So. 178; Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. Ed. 1043. The Gas Company, contending the contrary, points with equal confidence to Ozark Pipe Line Corp. v. Moiner, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439; State Tax Commission v. Interstate Natural Gas Co., 284 U. S. 41, 52 S. Ct. 62, 76 L. Ed. 156; Anglo-Chilean Nitrate Corp. v. Alabama, 288 U. S. 218, 53 S. Ct. 373, 77 L. Ed. 710; Dixie Ohio Express Co. v. State Revenue Com., 306, U. S. 72, 59 S. Ct. 435, 83 L. Ed. ....., and a score of other cases holding that interstate commerce is immune from various sorts of State taxation. It would be tedious to analyze the cases and impossible fully to reconcile them. The principle of stare

decisis in constitutional interpretations has recently received shattering blows in the Supreme Court, and especially in the field or immunities from general taxation. The increasing social burdens assumed by our governments, both State and National, will require increasing and more searching taxation for their support. Any immunity from equal general taxation appears more and more inconvenient and unjust. The recent re-examination of the basis for such immuniities has resulted in an upheaval. The current of authority has been turned. For the judicial navigator the cases are no longer the beacons marking out a fixed if tortuous channel. He must for awhile fix his eyes anew upon the Constitution as the pole star of his firmament and steer his course rather by principle than by precedent . . . .

"Impairment of the commerce power of Congress really arises only if the State by intention or in actual effect regulates commerce by license or other special taxation, or burdens it unduly so as to impede it; or if the State law imposing the tax conflicts with some regulation made by the Congress in its supreme right. The immunity of interstate commerce from State taxation could have been rested not on an implication from the Commerce Clause. U. S. C. A. Const. Art. 1, Chap. 8, Cl. 3, because of possible injury to commerce and on refinded distinctions as to the incidence and measure of the tax, but on the express provision that 'No State shall without the consent of Congress lay any imposts or duties on imports or exports'." (Emphasis suplied).

This case was appealed to the Supreme Court of the United States by certiorari, petition being filed June 5, 1939, and certiorari granted, 307 United States, 620.

On December 11, 1939, by a percuriam opinion rendered this case was affirmed without opinion, the only reference being see Southern Gas Corporation v. Alabama, 301 United States, 148. The judgment of affirmance being reported in 308 United States, 522. In order to illustrate the meaning of the court by its reference to the Southern Gas Corporation case. I quote herewith the following language from said case, as indicating the adoption of the opinion of the Circuit Court

of Appeals by the Supreme Court, which is indicated by the following language taken from the Southern Gas Corporation case, to-wit:

> "In the instant case the Supreme Court of the State has reviewed its rulings and has expounded the meaning of the statute. The state court holds that the tax is a franchise tax laid 'upon the right to do business.' It is a tax levied on 'foreign corporations as a prerogative to the **Right of exercise of its corporate functions in the State.**' It 'is not on any basis a tax on business' **but is laid 'on the exercise of corporate functions within the State and its employment of its capital in Alabama.** (Emphasis suplied).

Merely for the purpose of showing that the principle announced in the early case of Home Insurance Company of New York v. State of New York, 134 U. S. 594, has continued in force up to the present date, I quote from the case of Spector Motor Service, Inc. v. Walsh, Tax Commisioner, decided by the Circuit Court of Appeals of the Second Circuit on December 24, 1943, and reported in 139 Federal 2nd, 809 in which the Home Insurance Company case, supra, was quoted with approval in the following language:

> "This is in line with the consistent view of the Court in construing a tax of this kind to be one upon the privilege of **'doing business in a corporate capacity,'** and not upon the business or activities that were the outcome of the privilege. Home Ins. Co. of New York v. State of New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025; Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B 1312; People of State of Michigan v. Michigan Trust Co. 286 U. S. 334, 52 L. Ed. 1136. This concept is, of course reinforced by the action of the legislature in 1937 in expressly making the tax one upon not merely the carrying on of business in the state, but also upon 'the right to carry on' such business." (Emphasis supplied).

The case from which this last quotation was taken was removed to the Supreme Court of the United States by certiorari, 322 U. S. 720, the decision of this Court on said case being reported in 323 U. S. at page 101. And upon submis-

sion of the case to this Court after discussing the various questions raised and decided in the lower Courts, this Court used the following language in which it emphasized the rule that the construction of a state statute by the highest Court of such state would be controlling upon this Court. The language of this Court being as follows:

> "We would not be called upon to decide any of these questions of constitutionality, with their varying degrees of difficulty, if, as the Distrct Court held, the statute does not at all apply to one, like petitioner, not authorized to do intrastate business. Nor do they emerge unitl all other local Connecticut issues are decided against the petitioner. But even if the statute hits aspects of an exclusively interstate business, **it is for Connecticut to decide from what aspect of interstate business she seeks an exaction.** It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below.
>
> "Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give one. Only the Supreme Court of Errors of Connecticut can give such an answer. But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. That the answers are not obvious is evidenced by the different conclusions as to the scope of the statute reached by the two lower courts. The Connecticut Supreme Court may disagree with the District Court and agree with the Circuit Court of Appeals as to the applicability of the statute. But this is an assumption and at best "a forecast rather than a determination." Railroad Commission v. Pullman Co., 312 U. S. 496, 499. Equally are we without power to pass definitively on the other claims urged under Articles I and II of the Connecticut Constitution. If any should prevail, our constitutional issues would either fall or, in

any event, may be formulated in an authoritative way very different from any speculative construction of how the Connecticut courts would view this law and its application. Watson v. Buck, 313 U. S. 387, 401-402.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Railroad Commission v. Pullman Co., supra; Chicago v. Fieldcrest Dairies, 316 U. S. 168; In re Central R. Co. of New Jersey, 136 F. 2d 633. See also Burford v. Sun Oil Co. 319 U. S. 315; Meredith v. Winter Haven, 320 U. S. 228,235; Green v. Phillips Petroleum Co., 119 F. 2d 466; Findley v. Odland, 127 F. 2d 948; United States v. 150.29 Acres of Land, 135 F. 2d. 878. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication." (Emphasis supplied).

The case was then remanded to the lower Court to be retained until a proceeding could be brought in which the construction of the state court could be had.

All the foregoing was presented to the Supreme Court of Mississippi when this case was pending before that tribunal. And this contention, based on the cases heretofore discussed, was the basis for the finding of the Supreme Court of Mississippi as indicated by its language as same appears on pages 20 and 21 of the printed record:

"The franchise tax here sought to be collected by the State is not a tax upon 'doing business' as that term is ordinarily understood in the purely commercial sense, but is that which is defined in the statute Secs. 9312 and 9314, as follows: 'When the term doing business is used in this Act, it shall mean and include each and every

act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust.

"It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful (fol. 34) activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.

"This statutory definition was first approved in the connection here involved as within the power of the State in Stone v. International Gas Co., 103 Fed (2nd) 544, affirmed 308 U. S. 522. Subsequently, in a connection equally pertinent in principle, it was approved and sustained by this Court in Stone v. General Contract Purchase Corp., 193 Miss. 301, 312, and in Stone v. General Electric Contracts Corp., 193 Miss. 317 it being further held in the latter case that when the incidental local activities come within the definition, it would be immaterial that the foreign corporation had no local agents, and has no office, and is not qualified to do any intrastate business in this State.

"It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it has no substantial effect to block or impede the free flow of such commerce."

As authority for the contention that the construction of the State statute involved in this case by the highest Court of the State of Mississippi is controlling on this Court, I call

this Court's attention to the language used by Mr. Justice Frankfurter in the case of General Trading Company v. State Tax Commission of Iowa, reported in 322 U. S. at page 335.

The question before the Court in said last mentioned case was very similar to the question involved in the case now before this Court. It involved the construction of a state statute which imposed an obligation on a non-resident of the State of Iowa to collect and pay a Use Tax imposed by the law of Iowa on a mercantile company domiciled in Minnesota, said operation, and the assumption of the authority of the State of Iowa being based solely on the fact that Minnesota Trading Company sent its salesmen into the State of Iowa to solicit orders for merchandise. The Supreme Court of Iowa construed said law as a valid imposition on the non-resident company, solely because the provisions of the statute attempted to make such imposition.

And although the foreign corporation was not domesticated in the State of Iowa, had no agent nor office there, the Supreme Court of Iowa held that the obligation could be imposed on the foreign corporation on such activity as the law provided should constitute a basis for the imposition. And under that state of facts, this Court used the following language, which is applicable here:

> "A judgment in favor of the Tax Commission by one of the lower courts was affirmed by the Supreme Court of Iowa, 233 Iowa 877; 10 N. W. 2d. 659. The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here. From these it appears that General Trading Company had never qualified to do business as a foreign corporation in Iowa nor does it maintain there any office, branch or warehouse. The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post. Upon these facts and its holding that Trading Company was a 'retailer maintaining a place of business in this state' within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers

in the imposition of this use tax on Iowa purchasers, and that collection could validly be made through the Trading Company." (Emphasis supplied).

Again, for the purpose of showing that the right of the State to grant a Charter to its own corporations, or permit a foreign corporation to come into the State is not limited, as announced in the early case of Home Insurance Company of New York, supra, I quote from the case of Southern Pacific Company v. McColgan, Franchise Tax Commissioner, decided by the District Court of Appeals of the First District of California, February 16, 1945, reported in 156 Pacific 2d, page 81, the following:

"A franchise tax as to foreign corporations is for the privilege of doing business within the State. It is reasonable to measure that tax by net income from business done within the State or from property within the State, that is, by the fruits of the privilege. It is true that income from business done within the state may include income from interstate business to the extent that it is done within the state, as well as income from purely intrastate business. Matson Nav. Co. v. State Board, 297 U. S. 441, 56 S. Ct. 553, 80 L. Ed. 791, in the Supreme Court of California, 3 Cal. 2nd. 1, 43 P. 2nd 805; State of Wisconsin v. Minnesota Min. Co., 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165; United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; International Shoe Co. v. Shartel, 279 U. S. 429, 49 S. Ct. 380, 73 L. Ed. 781. This is so although the right to do interstate business within the state does not depend on privilege from the state, which can neither grant nor deny that right. Crutcher v. Commonwealth of Kentucky, 141 U. S. 47, 57, 11 S. Ct. 851, 35 L. Ed. 649; see note, 105 A. L. R. 11-17, citing cases. But although a foreign corporation does not owe its right to do interstate business to the state, it has the benefit and protection of the law and government of the state in the conduct of that business. There is a reasonable relation, therefore, between the measure of the tax and the rights and benefits enjoyed by the corporation, which is lacking when

the state attempts to include income from business or property without the state. Traynor, National Bank Taxation in California, 17 Cal. L. Rev. 232, 249-257."

It is therefore manifest that under the broad authority conferred upon the States to provide upon what basis a foreign corporation would be permitted to exercise any corporate function within the State, and the State of Mississippi having made mere ownership of tangible property within the State, a sufficient exercise of corporate function to subject a foreign corporation to the imposition of a franchise tax; and the fact that the Circuit Court of Appeals of the Fifth Circuit in the Interstate Natural Gas case has so construed the Mississippi statute, and the Supreme Court of the United States has affirmed said decision, then there can be no doubt that the mere ownership of tangible property in Mississippi by this petitioner will subject such corporation to a franchise tax computed on the basis of the assessed value of the tangible property owned in Mississippi.

For the purpose of demonstrating to the Court the uniformity and continuity of the decisions following the earlier cases on the same subject, especially with reference to the right of a state to impose a franchise tax upon a domestic corporation, or upon a foreign corporation for the privilege of doing business in a corporate capacity, I call the Court's attention to the recent case of West Publishing Company v. McColgan, Franchise Tax Commissioner, decided by the Supreme Court of California on February 27, 1946, and suggestion of error overruled on March 28, 1946.

The Court was construing a statute of California which provided "There shall be levied, collected and paid for each taxable year, a tax at the rate of 4 per cent upon the net income of every corporation derived from sources within the State on and after January 1, 1937." Said statute further providing "Income from sources within this State includes income from tangible or intangible property, located or having a situs in this State, and income from any activities carried on in the State, regardless of whether carried on in intrastate, interstate or foreign commerce."

The Legislature of California had exercised the broad authority permitted to a State as set out in the case of Home Insurance Company v. New York State, hereinbefore dis-

cussed. By electing from among the many methods granted to a State for fixing the basis on which a franchise tax would be computed, as the net income of every corporation derived from sources within the State. The taxpayer however challenged the validity of the law on the ground that its entire business conducted in the State of California was interstate business, and therefore any law which sought to impose a tax computed on the amount of such income was unconstitutional.

The taxpayer in said case also contended that since under the income tax law of the State of Minnesota in which the company was incorporated and had its place of business, required income tax to be paid on its entire income wherever derived, and that therefore an attempt to impose a tax based on any part of its income was double taxation.

On the first question as to whether or not a State could use income of a corporation as a subject or measure of the tax was answered by the Court in the following language:

> "The use of income as the measure rather than the subject of the tax in the Bank and Corporation Franchise Tax Act is in conformity with a method of taxing national banks authorized by section 5219 of the United States Revised Statutes, 12 U. S. C. A. S. 548, that permits the inclusion of income in the measure of the tax that could not be made the subject of the tax. Pacific Co., Ltd. v. Johnson, 212 Cal. 148, 298 P. 489; Id. 285 U. S. 480, 52 S. Ct. 424, 76 L. Ed. 893; Educational Film Corp. v. Ward, 282 U. S. 379, 51 S. Ct. 170, 75 L. Ed. 400, 71 A. L. R. 1226; Flint v. Stone Tracy Co. 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. The use of income as the subject of the tax in the corporation Income Tax Act is in conformity with the decisions of the United States Supreme Court, cited above, that a state may tax net income from interstate commerce even though it cannot tax the privilege of engaging in interstate commerce."

As to the second proposition of double taxation that such tax based on income would be double taxation, the Court used the following language:

> "Nor is there any merit to the contention that the act discriminates against interstate commerce on the

ground that it subjects part of plaintiff's income to double taxation, given the taxability of plaintiff's entire net income in the state of its domicile. Taxation in one State is not an immunization against taxation in other states. State Tax Comm. v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A. L. R. 1436; Curry v. McCanless, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A. L. R. 162; Graves v. Elliott, 307 U. S. 383, 59 S. Ct. 913, 83 L. Ed. 1356; Guaranty Trust Co. v. Virginia, 305 U. S. 19, 59 S. Ct. 1, 83 L. Ed. 16. Taxation by states in which a corporation carries on business activities is justified by the advantages that attend the pursuit of such activities. State of Wisconsin v. J. C. Penny Co., 311 U. S. 435, 446 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229. 'Income may be taxed both by the state where it is earned and by the State of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state.' State Tax Comm v. Aldrich, supra, at page 178 of 316 U. S., at page 1010 of 62 S. Ct. 86 L. Ed. 1358, 139 A. L. R. 1436; Curry v. McCanless, supra, at page 367 of 307 U. S., at page 900 of 59 S. Ct., 83 L. Ed. 1339. 123 A. L. R. 162."

Another contention made by the present petitioner that there is no basis for imposing a franchise tax because it is not qualified to do business in the State, is answered by this further language of the Court in this recent case in the following language:

"Plaintiff contends that it has no income from sources in California within the meaning of the act on the ground that income derived from activities in furtherance of a purely interstate business does not have a source within this state. This conclusion is contrary to the express provision of the act that 'income from sources within this state includes . . . income from any activities carried on in intrastate, interstate or foreign commerce.' All the cases cited by plaintiff (Department of Treasury v. International Harvester Co., 221 Ind. 416, 47 N. E. 2d 150, 152; Commissioner of Internal Revenue v. Piedras Negras Broadcasting Co., 5 Cir., 127 F. 2d 260; Compania General de Tobacos v. Collector of Internal Revenue, 279 U. S. 306, 49 S. Ct. 304, 73 L. Ed. 704; Commissioner of

Internal Revenue 279 U. S. 306, 49 S. Ct. 304, 73 L. Ed. 74; Commissioner of Internal Revenue v. East Coast Oil Co., S. A., 5 Cir., 85 F. 2d 322, involved statutory construction rather than constitutional power, and none of them involved a statute like the act in question which expressly defines income from sources within the state as including income from any activities carried on in the state.

"Plaintiff contends that the tax violates the due process clause of the Fourteenth Amendment of the Constitution of the United States on the grounds that the state is without jurisdiction of the person, property, or business of the plaintiff, and that it gives plaintiff no protection, opportunities, or benefits that would justify a tax. The record shows without conflict that plaintiff engages in substantial income-producing activities in California. It has local offices here as well as employees who devote their entire time to soliciting orders, receiving payments, adjusting complaints, collecting delinquent accounts, and performing other services for plaintiff. This state provides a market in which plaintiff operates in competition with local law-book publishers. Plaintiff's agents receive the same protection and other benefits from the state as agents carrying on business activities for a principal engaged in intrastate business. The state protects plaintiff's business transactions within its borders and maintains courts in which plaintiff enforces payment for the sale of its publications."

A DISCUSSION OF THE AUTHORITIES RELIED UPON BY THE PETITIONER

Since it is a fact recognized by all the Courts that prior decisions with reference to the immunity from taxation of foreign corporations are no longer "the beacons marking out a fixed if tortuous channel." as stated by Judge Sibley of the Circuit Court of Appeals, but it is likewise true, as stated by Judge Sibley in the case of Stone v. Interstate Natural Gas Company, supra, that:

"The principal of stare decisis in constitutional interpretations has recently received shattering blows in the

Supreme Court, and especially in the field of immunities from general taxation. The increasing social burdens assumed by our governments, both State and National, will require increasing and more searching taxation for their support. Any immuit from equal general taxation appears more and more inconvenient and unjust. The recent re-examination of the basis for such immunities has resulted in upheaval. The current of authority has been turned. For the judicial navigator the cases are no longer the beacons marking out a fixed if tortuous channel. He must for awhile fix his eyes anew upon the Constitution as the pole star of his firmament and steer his course rather by principle than by precedent."

I shall therefore not consume the time of the Court by making any reference to the cases cited by the attorneys for the petitioner, decided before the date of said decision, since the Court of Mississippi definitely states that it is committed to the "new trend," which is likewise true of all other Courts, including this Court. I shall therefore discuss only the more recent cases cited by the attorneys for the petitioner.

The case of Illinois Natural Gas Company vs. Central Illinois Public Service Company, reported in 314 U. S. 498, was a case involving an order of the Public Service Commission, requiring the appellant to supply another company with natural gas, and to make the necessary pipe line connection. This case therefore involved an attempt at regulation of the manner in which the business of the appellant was conducted. I am unable to see any application of said case to the question involved in the case before this Court, which has nothing whatever to do with any regulation or control over the business of the petitioner.

Another case cited by the attorneys for the petitioner in point of time of decision is the case of Murdock vs. Pennsylvania, 319 U. S. 105. This is one of the so-called "Jehovah's Witnesses" cases. The case involved only the validity of a municipal ordinance requiring the payment of a privilege tax for the privilege of selling religious tracts. And again, I am unable to conceive how said case, or any question decided thereby, would have the remotest application to the case before this Court.

The only recent case that is cited by the attorneys for the

petitioner which approaches the question before this Court, is the case of Freeman vs. Hewit, decided by the Supreme Court of the United States on December 16, 1946, reported in Advance Sheet No. 3 of Volume 91 of the United States Supreme Court decisions. This case involved the right of the State of Indiana to impose a tax upon "the receipt of the entire gross income" of residents and domiciliaries. This fact alone is sufficient to distinguish said case from the case at bar, since the case before this Court has no application to and does not involve any question of the right of the State of Mississippi to impose any tax based upon the business conducted by the appellee. But in the general discussion of the subject by the Court, certain fundamental principles were mentioned which not only serve to distinguish said case from the case at bar, but which support the contention of the respondent in this case as to the right of a sovereign state to demand tribute such as that exacted by the law under consideration as distinguished from the interference with, or control of interstate commerce. The language of the Court applicable to the case at bar being:

> "The power of the State to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and of the constituent States.
>
> "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.
>
> "But in the necessary accommodation between local needs and the overriding requirements of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial.

"To extract a fair tithe from interstate commerce for the local protection afforded it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. American Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522; Utah Power & L. Co. v. Pfost, 286 U. S. 165 76 L. Ed. 1038, 52 S. Ct. 548. It can impose license taxes on domestic and foreign corporations who would do business in the State, Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632, 38 S. Ct. 295; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 364, 59 L. Ed. 265, 272, 35 S. Ct. 99, though it cannot, even under the guise of such excises, 'hamper' interstate commerce. Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 S. Ct. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. Ed. 378, 30 S. Ct. 232 (particularly White, J., concurring at p 63); Henderson, the Position of Foreign Corporations in American Constitutional Law (1918) 118-123, 128-131. It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. United States Glue Co. v. Oak Creek, 247, U. S. 321, 62 L. Ed. 1135, 38 S. Ct. 499, Ann. Cas. 1918E 748; cf. Atlantic Coast Line R. Co. v. Daughton, 262 U. S. 413, 67 L. Ed. 1051, 43 S. Ct. 620.

"These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the cost of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts,

> a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause."

The only other case cited by the attorney for the petitioner, which I deem it necessary to consider only because of the fact that it was decided subsequent to the date on which the modern trend of decisions began, is that of Joseph v. Carter & Weekes Stevedoring Company, decided March 10, 1947, and reported in Advance Sheet No. 9 of Volume 67 of the Supreme Court Reporter at page 815. This case, unlike the case now before the Court, involved a statute which sought to impose a definite percentage of the gross receipts of an activity which was definitely a part of interstate commerce. The Court pointing out that under the "Puget Sound" case that the Courts had held that by reason of the fact that sea-going vessels required skillful loading for the safety of the vessel and the cargo, made the activity of stevedores in loading the vessels an integral part of the interstate commerce.

The Court realized, however, that the tax demanded, and the bas's of such demand in the present case is entirely separate and distinct from the receipts of the business conducted by the petitioner, in that there is no relation to, or reference whatever to the income from the business conducted.

The Legislature of Mississippi in enacting the statute under consideration, as well as the Commissioner, in his construction of the statute as applied to the basis for imposition of the tax involved in this case, considered only one basis for measurement of the tax involved, and that is the assessed value of the tangible property owned in Mississippi in a corporate capacity, which ownership enjoyed the protection of laws and government of the state.

I therefore assert that the case referred to not only has no bearing on the question before this Court, but the following language from said opinion definitely upholds the contention of the respondent that there is no constitutional inhibition nor decision of any Court which would deny the right of the state to impose the tax on the sole basis which the tax in question was demanded:

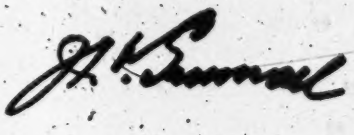
> "It is trite to repeat that the want of power in the confederation to regulate commerce was a principal rea-

son for the adoption of the Constitution. The Commerce Clause bears no limitation of power upon its face, and when the Congress acts under it, interpretation has suggested none, except such as may be prescribed by the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. Ed. 23; United States v. Carolene Products Co., 304 U. S. 144, 147, 58 S. Ct. 778, 780, 781, 82 L. Ed. 1234; North American C. v. Securities and Exchange Commission, 327 U. S. 686, 704, 66 S. Ct. 785, 795, 796. **On the other hand, the Constitution, by words, places no limitation upon a state's power to tax the things or activities or persons within its boundaries."**

CONCLUSION

I therefore respectfully submit that the judgment of the Supreme Court of Mississippi was eminently correct. Said Court having construed the law involved, as applied to the facts in the case, which limited the imposition of the tax to the alternative provided by statute of demanding tribute only on the basis of the protection received, measured by the value of property as submitted by the owner for the purpose of ad valorem taxes; and the amount of the taxes demanded having no relation to nor measured by the volume of interstate business transacted through its facilities, said tax could not be regarded as applying to, interfering with, nor regulating interstate commerce.

I further submit that said case should be affirmed by this Court.



RESPECTFULLY SUBMITTED:
J. H. Sumrall
Attorney for the Respondent

CERTIFICATE

I, J. H. Sumrall, Attorney of Record for the respondent in the foregoing styled and numbered cause, do hereby certify that I have on this date mailed to the proper post office address, with sufficient postage attached thereto, true copies of this brief to Hon. Bernard L. Tighe, Attorney, of Jackson, Mississippi, and Hon. E. P. Russell, Attorney, of Memphis,

Tennessee, the Attorneys of Record for the petitioner herein.

This 5th day of November, A. D., 1947.

Attorney for the Respondent

SUPREME COURT OF THE UNITED STATES

No. 94.—October Term, 1947.

Memphis Natural Gas Company, Petitioner, v. A. H. Stone, Chairman, State Tax Commission of Mississippi. | On Writ of Certiorari to the Supreme Court of the State of Mississippi.

[June 21, 1948.]

Mr. Justice Reed announced the judgment of the Court and an opinion in which Mr. Justice Douglas and Mr. Justice Murphy join.

The Memphis Natural Gas Company is a Delaware corporation which owns and operates a pipe line for the transportation of natural gas. The line runs from the Monroe Gas Field in the State of Louisiana through the states of Arkansas and Mississippi to Memphis and other points in the State of Tennessee. Approximately 135 miles of the pipe line lie within Mississippi; at two points within that state there are compressing stations. It is stipulated that the Gas Company has never engaged in any intrastate commerce in Mississippi; that it has only one customer within the state, the Mississippi Power and Light Company, to which it sells gas from its interstate line at wholesale from several delivery points; that the Gas Company has never qualified under the laws of Mississippi to do intrastate business within that state; that it has no agent for the service of process and that it has no office within the state; and that its only employees and representatives in Mississippi are those necessary to maintain the pipe line and its auxiliary appurtenances.

The Gas Company has paid all ad valorem taxes assessed against its property in Mississippi pursuant to the state law. In addition to the ad valorem taxes, Missis-

sippi imposes a "franchise or excise tax" upon all corporations "doing business" within the state.[1] For the purpose of the Act, "doing business" is defined "[to] mean and [to] include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization."[2] The tax is "equal to $1.50 for each $1,000.00 or fraction thereof, of the value of capital used, invested or employed" within the state.

The Gas Company filed a petition for review by the State Tax Commission of Mississippi of the franchise tax

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[1] Miss. Code § 9313 (1942): "There is hereby imposed . . . a franchise or excise tax upon every corporation . . . now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to $1.50 for each $1,000.00 or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the state of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence."

§ 9314: "For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

[2] Miss. Code § 9312 (1942).

assessed against it for the years 1942, 1943 and 1944 by the State Tax Commissioner. In this petition the Gas Company argued that the imposition of the tax by the state was an act prohibited by the Commerce Clause of the Federal Constitution. From an order of the Tax Commission approving the action of the Commissioner, the Gas Company appealed to the Circuit Court of Hinds County, Mississippi. That court reversed the Tax Commission, but was itself reversed by the Supreme Court of Mississippi. The Supreme Court said that Mississippi had made "no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." 201 Miss. —, —. It argued that the state tax did not bear directly upon interstate commerce and that any burden imposed upon that commerce was remote and unsubstantial. It concluded that the local tax was not unconstitutional and ordered that the taxes in question, plus penalties, be paid by the Gas Company. A petition for certiorari, under § 237 (b), Judicial Code, was filed in this Court by the Gas Company on May 17, 1947. It presented the question as to whether the judgment violated the Commerce Clause by requiring a foreign undomesticated corporation, engaged in interstate commerce, to pay the tax. That petition was granted June 16, 1947. 331 U. S. 802.

The suggestion is made that by the stipulation of facts in the trial court, Mississippi concedes the truth of an

allegation of the challenged petition before the State Tax Commission reading as follows:

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession and possession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving it of such right, unless congress should see fit to interpose some contrary regulation. Your Petitioner obtains no protection from the State of Mississippi and acquires no powers or privileges in its interstate activity other than the protection afforded your Petitioner by virtue of the payment of an ad valorem tax on the property used by the Company wholly in interstate commerce."

It is said that because of this concession Mississippi cannot exact a tax from petitioner as the state "affords nothing to this petitioner for which it could ask recompense by way of a tax." The pertinent part of the stipulation reads: "That all of the facts stated in said petition are true and no proof of the same shall be required in this cause." No contention as to the concession is presented to us by the petition for certiorari, assignment of errors or brief. Petitioner's contention is that the tax levied against it is invalid under the Commerce Clause. Petitioner's failure to raise the question alone would justify a refusal here to consider the contention. See *Connecticut R. Co.* v. *Palmer*, 305 U. S. 493, 496; *Kessler* v. *Strecker*, 307 U. S. 22, 34. The answer to the suggestion, however, seems to us clear. The argument is that the Supreme Court of Mississippi must be reversed because the tax before us "is a tax on the privilege of engaging in the

doing of interstate business within the State, and such a tax is . . . invalid under the Commerce Clause." This conclusion seems to be reached by the following analysis. The stipulation between the Company and the State Tax Commission is read as if the phrase "in its interstate activity" modified only the words "powers" and "privileges" and not the word "protection." If that is a proper construction of this stipulation, then the parties have agreed that the Company has obtained by the tax "no protection from the State . . . other than the protection afforded . . . by virtue of the payment of an ad valorem tax . . . ." The dissent then concludes that the imposition of the ad valorem taxes "exhausted" the state's taxing power and, consequently, that the tax "is a tax on the privilege of engaging in interstate business" and, as such, "invalid under the Commerce Clause."

The state Supreme Court construed the tax as "an exaction . . . as a recompense for . . . protection of . . . the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." As we are bound by the construction of the state statute by the state court, it is idle to suggest that the tax is on "the privilege of engaging in interstate business." Nor can this result be changed by the suggestion that the tax cannot be on any local incidents "because they have already been fully taxed." The local incidents, spoken of by the Supreme Court of Mississippi, were not the taxable events selected for the imposition of the ad valorem tax. These local incidents were the basis for the franchise or excise tax now in controversy. No reason is perceived why Mississippi cannot exact this different tax for the same protection. It is as though the ad valorem rate had been increased. The power to levy such a new tax is not and could not be questioned except as an interference with commerce.

The legal question remains as to whether a state can exact a tax on those activities under the Commerce Clause.

The facts of this case present again the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities admittedly necessary to maintain or operate the interstate business of the taxpayer. This transportation by pipe line with deliveries within the state at wholesale only is interstate business. *Panhandle Eastern Pipe Line Co.* v. *Comm'n*, 332 U. S. 507, 513, and cases cited. Notwithstanding the power granted to Congress by the Commerce Clause to regulate the taxation of interstate commerce, if it so desires,[3] that body generally has left the determination to the courts of what state taxes on or affecting commerce were permissible and what impermissible under the Commerce Clause. The states have sought by taxation to collect from the instrumentalities of commerce compensation for the protection and advantages rendered to commerce by state governments. The federal courts have sought over the years to determine the scope of a state's power to tax in the light of the competing interests of interstate commerce, and of the states, with their power to impose reasonable taxes upon incidents connected with that commerce. See *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 441. We continue at that task, characterized long ago as an area of "nice distinctions." *Galveston, Harrisburg & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 225.

There is no question here of Due Process. The Gas Company's property is in the taxing state where the taxable incidents occurred. *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 329. See *Nippert* v. *City of Richmond*, 327

[3] *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429.

U. S. 416, 423. Nor is the measure used to calculate the amount of the tax challenged. That measure is $1.50 on each thousand dollars of capital employed within Mississippi. *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, 156, Third. The attack on the Mississippi statute is that it violates the Commerce Clause by putting a tax on the commerce itself.

The local incidents covered by the definition of doing business hereinbefore set out, § 9312, Mississippi Code, *supra*, were said by the Supreme Court in this case to be "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system" in Mississippi. 201 Miss. —, —.[4] The cases just cited in

[4] Such local incidents form a sound basis for taxation by a state of foreign corporations doing interstate business. For example, we have upheld state taxes on sales after completion of the interstate transit, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; on production of electricity for interstate commerce, *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, compare *Fisher's Blend Station, Inc.*, v. *Tax Comm'n*, 297 U. S. 650, 655; a privilege tax on the operation of machines for the production of electricity to drive gas in interstate commerce, *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604; a use tax on rails shipped interstate for immediate incorporation into an interstate transportation system, *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167.

We have upheld a franchise tax on a foreign corporation authorized to do business and making sales in a state other than its actual or business domicile, *Ford* v. *Beauchamp*, 308 U. S. 331; a privilege tax on a foreign corporation doing business in the state upon a proportion of property in the taxing state that was computed by using interstate commerce as an element, *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511; an excise on intrastate manufacturing, added to an ad valorem tax and measured by sales, including out of state, *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, and see Powell, 60 Harv. L. Rev. 508 and 727, *Freeman* v. *Hewit*, 329 U. S. 249, 255; a license for storing goods at rest in the state under a transit privilege, *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70.

the note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself.[5] But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. *Nippert* v. *City of Richmond, supra,* at 423. The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce.[6] Again, where there is a state exaction for some intrastate privilege that discriminates against interstate commerce, it is invalid even though it is sufficiently disconnected from the commerce to be taxable otherwise.[7]

The Mississippi tax under consideration is not discriminatory. It is levied, in addition to ad valorem taxes, on corporations created under Mississippi laws, those admitted to do business in Mississippi and those operating in the state without any authority from the state. See note 1, *supra.* Petitioner operated local compressor stations. We have heretofore held that the generation of electric energy for the operation of such stations was subject to state taxation without violation of the Commerce Clause. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U. S. 604. A glance at the activities, named above, listed by the Supreme Court of Mississippi, shows that there is

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[5] See *Western Live Stock* v. *Bureau,* 303 U. S. 250, 254.

[6] See *Western Live Stock* v. *Bureau,* 303 U. S. 250, 255.

[7] See *Best & Co.* v. *Maxwell,* 311 U. S. 454; *Nippert* v. *City of Richmond, supra,* at 431–32. Cf. *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495, 501–502.

no possibility of multiple taxation through the same exactions by other states. The amount of the tax is reasonable.[8] It is properly apportioned to the investment in Mississippi.[9]

However, a state tax upon a corporation doing only an interstate business may be invalid under our decisions because levied (1) upon the privilege of doing interstate business within the state,[10] or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself.[11] Petitioner asserts that the Mississippi statute so offends.

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[8] See *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, 295, and *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, 514.

[9] See *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, 156, Third, and cases cited; *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 422–23; *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495, 501–502.

[10] This Court has held many times that a state has no power to refuse or tax the privilege of doing interstate business. A foreign corporation, seeking or requiring no privilege from a state such as the power of eminent domain, the right to use public ways or beds of streams, and without federal charter or other federal statutory privilege, cannot be denied the right to enter a state, remain there and operate a purely interstate business without a state franchise. *Crutcher* v. *Kentucky*, 141 U. S. 47, 56; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107 (3); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. See also *California* v. *Pacific R. Co.*, 127 U. S. 1; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *Colorado* v. *United States*, 271 U. S. 153, 164; *State ex rel. Board* v. *Stanolind Pipe Line Co.*, 216 Iowa 436, 445.

[11] *Freeman* v. *Hewit*, 329 U. S. 249, "because it taxes the very process of interstate commerce" (p. 253), it is "a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause" (p. 256); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax . . . upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid" (p. 433); this follows, "a line of

First. This Court has drawn the distinction in the field of pipe line taxation between state statutes on the privilege of doing business where only interstate business was done and those upon appropriate local incidents. In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, the Ozark Pipe Line Corporation operated an oil pipe line from Oklahoma, through Missouri to a point in Illinois. Oil was neither received nor delivered in Missouri. This was interstate transportation. *Interstate Natural Gas Co.* v. *Power Comm'n*, 331 U. S. 682, 689, and cases cited at note 12. It had its principal office in Missouri. It had a license from Missouri authorizing it to engage "'exclusively in the business of transporting crude petroleum by pipe line.'" Page 561. The state tax was an apportioned franchise tax.[12] It was construed by this Court as a tax "upon the privilege or right to do business." Page 562. *Virginia* v. *Imperial Coal Co.*, 293 U. S. 15, 20. As such a tax upon a corporation doing only an interstate business, it was held invalid under the Commerce Clause.[13]

In *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, a pipe line ran from Louisiana, through

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precedents outlawing taxes on the commerce itself" (p. 433). *Galveston, Harrisburg & S. A. R. Co.* v. *Texas*, *supra* at 224.

See *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 312, n. 11; see comments on *American Mfg. Co.* v. *St. Louis*, n. 4, *supra*.

[12] Mo. Rev. Stat. § 9836 (1919):

". . . Every corporation, not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the state of Missouri equal to one-tenth of one per cent. of the par value of its capital stock and surplus employed in business in this state . . . ."

[13] The opinion evoked a dissent by Justice Brandeis which pointed out that: "The tax assailed is not laid upon the occupation . . ."; nor "upon the privilege of doing business." Pp. 567–68. The Justice concluded that "a tax is not a direct burden merely because

Mississippi and back to Louisiana. Two local Mississippi distributors took gas in that state from the respondent. Mississippi sought to tax the respondent under a privilege tax law that required the pipe line company to get a license to exercise the privilege desired that

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it is laid upon an indispensable instrumentality of such commerce," but that the contrary is true "where it is upon property moving in interstate commerce." P. 569. Compare *Ozark* with *Atlantic Lumber Co.* v. *Comm'r*, 298 U. S. 553.

The *Ozark* case has had a long history in this Court. Since 288 U. S., it has not been cited in a manner pertinent to our present issue, except to be distinguished, sometimes narrowly. In *Helson* v. *Kentucky*, 279 U. S. 245, 249, and *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 43, it was cited with approval for the proposition that a state cannot lay a tax on the occupation or the business of carrying on interstate commerce. In *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, *Ozark* was relied upon to hold unconstitutional a state tax upon a corporation which was qualified to do intrastate business within the state but which in fact did only an interstate business. Cardozo, J., joined by Brandeis, J., and Stone, J., dissented on the ground that the tax could be supported as a tax laid upon the privilege to do intrastate business. *Ozark* was next before the Court in *Virginia* v. *Imperial Coal Co.*, *supra*, a case involving a tax on tangible and intangible property situated and used within the state to carry on an exclusively interstate business. In that case it was distinguished on the ground that an ad valorem property tax, and not a privilege tax, was before the Court. In *Atlantic Lumber Co.* v. *Comm'r*, 298 U. S. 553, involving an excise tax on corporations doing business within Massachusetts, *Ozark* was again distinguished, this time on the ground that the Lumber Co. was engaged in local activities within the state and, therefore, that the burden imposed upon its interstate commerce was remote and incidental. Again, in *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, *Ozark* was found to be inapposite because of factual differences. *Southern Gas* ruled upon the constitutionality of a tax assessed on the basis of the same tax that was before this Court in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, *supra*. The state tax was held constitutional by the *Southern Gas* case as a tax exacted for the privilege of doing an intrastate business by a company in fact engaging in intrastate business in Alabama.

is, to operate an interstate pipe line.[14] This Court held that the entire business of the respondent was interstate despite a claimed local activity by the reduction of pressure to deliver gas to the Mississippi distributors. It followed that the state license for the privilege of engaging in the business of operating a pipe line was an invalid burden under the Commerce Clause.[15]

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[14] Miss. Gen. Laws (1930), ch. 88, § 3: "Every person desiring to engage in any business, or exercise any privilege hereinafter specified, shall first, before commencing same, apply for, pay for, and procure from the proper officer a privilege license authorizing him to engage in the business, or exercise the privilege specified therein; and the amount of tax shown in the following schedules is hereby imposed for the privilege of engaging and/or continuing in the businesses set out therein."

Id., § 163: "Upon each person engaging and/or continuing in this state in the business of operating a pipe line or transporting in or through this state oil, or natural, or artificial gas, through pipes, and/or conduits, a tax, as follows: [On each mile a varying tax that depended upon the diameter of the pipe]."

[15] The same rationale has led this Court at times to declare invalid similar taxes on foreign corporations, admitted to do business in a state and doing only an interstate business through activities within the state. The leading decisions supporting this view (*Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, and *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203) have been strictly limited. *Atlantic Lumber Co.* v. *Commissioner*, 298 U. S. 553; cf. *Southern Gas Corporation* v. *Alabama*, *supra*, at p. 156, and dissent in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, 229, at 237. In the *Cheney* case an excise tax for the privilege of doing business in Massachusetts of an unapportioned percentage of its authorized capital stock (Mass. Acts, 1909, c. 490, Part III, § 56) was invalidated as being wholly on interstate commerce although it maintained "in Boston a selling office with one office salesman and four other salesmen who travel through New England. The salesmen solicit and take orders, subject to approval by the home office in Connecticut, and it ships directly to the purchasers. No stock of goods is kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders are retained, but no bookkeeping is done, and the office makes no collections. The

On the other hand, in *Interstate Natural Gas Co.* v. *Stone*, 308 U. S. 522, we affirmed *per curiam* a judgment of the Fifth Circuit in *Stone* v. *Interstate Natural Gas Co.*, 103 F. 2d 544, on the authority of *Southern Gas Corporation* v. *Alabama, supra* at 153, 156–57. The tax in question in the 308 U. S. case was exacted by the same Mississippi statute employed here. This differs from the Mississippi statute in the *Interstate* case in 284 U. S. The *Interstate* case in 308 U. S. differed from this present case, so far as is material, only in the fact that the foreign corporation filed a copy of its charter as a prerequisite to doing business in Mississippi and appointed an agent for the service of process. The page references in the *Stone* citation of the *Southern Gas* case show that this Court considered the Mississippi tax in the *Stone* case as one not on business but " 'on the privilege of exercising corporate functions within the State and its employment of its capital in [Mississippi].' " *Southern Gas Corp.* v. *Alabama, supra,* 153. In the *Southern Gas* case, page 155, the company did intrastate business but in the *Stone* case, no intrastate business was done. Thus the local event of qualifying for intrastate business, which occurred in both *Southern Gas* and *Stone*, brought a different result from that in the *Ozark* case and in *Interstate*, 284 U. S., where the privilege or right to do interstate business was protected. Mississippi, through its Supreme Court, has declared that there is no attempt to tax the privilege of doing an interstate

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salesmen and the office rent are paid directly from Connecticut and the other expenses of the office are paid from a small deposit kept in Boston for the purpose. No other business is done in the State." P. 153.

In the *Alpha Portland* case where, on the assumption that the taxpayer had obtained a right to do business in the state, under similar circumstances an unapportioned excise on the privilege to do business in Massachusetts was invalidated because a burden on commerce.

business or to secure anything from the corporation by this statute except compensation for the protection of the enumerated local activities of "maintaining, keeping in repair and otherwise in manning the facilities." 201 Miss. ——. Under § 9314, quoted in note 1, in the light of that statute's definition of "doing business" set out on page 2 *supra*, this is a reasonable meaning to give the taxing statute. We must accept the state court's interpretation.[16] We therefore conclude that the Mississippi statute here involved is not upon the privilege of doing an interstate business.

Second. We come now to the second question. That is whether the challenged excise for carrying on within the state the aforementioned activities of maintenance, repair and manning by a corporation engaged solely in interstate commerce may be taxed. The answer on this point depends upon whether these activities are so much a part of the interstate business as to be under the protection of the Commerce Clause as this Court has construed it.[17] In this case the local activities are those involved in the maintenance of the pipe line. This tax is not an unapportioned tax on gross receipts from the commerce itself. It is measured by a proportion of the capital employed within the state. It cannot be duplicated in other states. Compare *Western Live Stock* v. *Bureau*, 303 U. S. 250, 255. In *Ozark Pipe Line* v. *Monier*, *supra* this Court, at p. 565, spoke of such activities as set out below,[18] "If

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[16] *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Southern Gas Corp.* v. *Alabama*, *supra* at 153, First; *Skiriotes* v. *Florida*, 313 U. S. 69, 79; *Caldarola* v. *Eckert*, 332 U. S. 155, 158.

[17] See note 11, *supra*.

[18] This Court said, 266 U. S. at 565: "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and

it was intended to say that such in-the-state activities as there described could not be taxed, we disagree with that conclusion. We are inclined to the view that the fact that the tax there under consideration was considered a tax "upon the privilege or right to do business," led the Court to point out that as the local activities were essential to that business, they were not taxable activities. The pipe line itself and all appurtenances are essential, yet an ad valorem tax can be laid.[19]

In taxation, we do not have the problems raised by many decisions on state regulations alleged to impede the free flow of commerce when not nationally uniform. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761. Regulations may be imposed by the state on commerce. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, *supra*; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.

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automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business." See also *Heyman* v. *Hays*, 236 U. S. 178, 185.

[19] *Cleveland C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439, 445:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

See also *Northwest Airlines* v. *Minnesota*, 322 U. S. 292; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

When state taxation of activities or property within a state is involved, different considerations control. It is no longer a question of actual interruption of the operation of commerce. *Kelly* v. *Washington*, 302 U. S. 1, 14. Rather a prohibited tax exaction is one beyond the power of the state because the taxable event is outside its boundaries, *McLeod* v. *Dilworth Co.*, *supra*, or for a privilege the state cannot grant. See note 10, *supra*. Is it bad because a tax on the commerce itself? We have sustained a fee for the privilege of using state courts, exacted by the state from a business licensed by the United State to handle customs charges. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202.[20] Likewise a special privilege tax upon an interstate automobile transportation company for the use of the state roads has been approved. *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495.

The Mississippi excise has no more effect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be

[20] In the *Union Brokerage* case we dealt not with an annual tax on franchises or licenses but with a state's single exaction from a foreign corporation for the right to use the courts of the state. The company was a customhouse broker engaged wholly in thus earning fees "'charges upon the commerce itself,'" p. 209. There were incidental activities in the state in furtherance of this main purpose, p. 208: "Union's business is localized in Minnesota, it buys materials and services from people in that State, it enters into business relationships, as this case, a suit against its former president, illustrates, wholly outside of the arrangements it makes with importers or exporters."

conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 94.—October Term, 1947.

Memphis Natural Gas Company, Petitioner, v. A. H. Stone, Chairman, State Tax Commission of Mississippi.	On Writ of Certiorari to the Supreme Court of the State of Mississippi.

[June 21, 1948.]

Mr. Justice Rutledge, concurring.

In accordance with views which I have heretofore expressed,[1] it is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or "jurisdiction to tax" in that sense is concerned;[2] it is nondiscriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character;[3] is duly apportioned, that is, does not undertake to tax any interstate activities carried on outside the state's borders;[4] and cannot be repeated by any other state.[5]

[1] See *McLeod* v. *Dilworth Co.*, 322 U. S. 327; *General Trading Co.* v. *Tax Comm'n, id.* 335; *Harvester Co.* v. *Dept. of Treasury, id.* 340, separate opinion, *id.* 349; *Freeman* v. *Hewit*, 329 U. S. 249, concurring opinion at 259.

[2] See 322 U. S. at 352, 353; *Nippert* v. *Richmond*, 327 U. S. 416, 423, 424.

[3] See Miss. Code § 9313 (1942), imposing a comparable tax, of identical amount, upon companies organized under Mississippi laws. Intrastate business done in the state obviously would be subject to one tax or the other, depending on whether the company doing it were organized under the state's laws or those of another state.

[4] The statute, Miss. Code §§ 9313 and 9314 (1942), expressly measures and limits the tax by an amount "equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed *within this state* . . ." (Emphasis added.)

[5] Cf. note 4. Apportionment in itself prevents taxation of extrastate "events" or portions of the business done, unless the apportion-

In this view the tax is not different in any substantial respect, for purposes of the commerce clause's prohibitive application, from the apportioned tax upon gross receipts from interstate transportation levied by New York and sustained by the decision recently rendered in *Central Greyhound* v. *Mealey*, 334 U. S. —.[6] That tax is nonetheless one upon the commerce, although it is apportioned. The apportionment, however, guards it from the vice of taxing commerce done in other states and thus also from multiplication by them.[7] In my view the same consequence follows here, in practical effect, both for the bearing of the tax and for saving its validity.

It may be that for the purposes of this case there is little more than a verbal difference in so regarding the tax and in looking at it as one not "upon" the commerce, although affecting it, but as being laid upon "incidents of the commerce" or "taxable events" taking place in Mississippi which are regarded as being "sufficiently separate from" the commerce, whether by reason of the apportionment or otherwise, to sustain the tax. To the

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ment is itself constitutionally invalid as not reflecting a sufficient approximation to what the state may be entitled, on the facts, to tax. Cf. Stone, C. J., dissenting in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 315–316, and authorities cited.

[6] It is, of course, for New York to say whether its tax will be applied upon the apportioned basis permitted by the Court's opinion. There would seem to be little doubt that such an application will be made, in view of the state's alternative argument here for sustaining the tax to that extent in the event its unapportioned application should be found invalid.

[7] See *Freeman* v. *Hewit*, 329 U. S. 249, 266 (concurring opinion) and authorities cited.

That the apportionment in the one case is made in relation to mileage and in the other to the value of capital "used, invested or employed within this state" is of no significance, since the states have considerable latitude in the selection of fair methods of making apportionment. Cf. note 5.

extent that no greater difference is presently involved, I accept the Court's conclusions and its reasoning.

But the difference conceivably may be of large, indeed of controlling, importance for other cases. And, so far as this may be true, I am unable to revert to rationalizations which make merely verbal formulae without reflection of differences in substantive effects controlling in these matters.

The New York legs of the journey involved in the *Central Greyhound* case, *supra*, are interstate commerce, as much as those in New Jersey and Pennsylvania. They do not lose that character merely because an apportioned tax may be levied upon the gross receipts from them. The incidence of that tax is flatly on the commerce, though only on the local portion of it. So here I do not think that the local activities for the protection of which the Mississippi tax purports in terms to be laid become separate from the interstate business which petitioner conducts in Mississippi, either by reason of the apportionment or otherwise. But they are incidents of carrying on that business taking place in Mississippi and only there, for which Mississippi affords protection received from no other state or the United States. Nor can any other state give that protection. For that portion of the business and the protection given it, I think the state is entitled to levy such a tax as has been placed here. Nothing in the commerce clause or its great purposes forbids such an exaction. Nor is the state limited to a single exaction for different or indeed like protections afforded, so long as each is safeguarded against prohibited effects upon commerce, as are those laid by Mississippi, and their aggregate cannot be shown to contravene the clause's purpose.

Accordingly, I concur in the Court's judgment.

SUPREME COURT OF THE UNITED STATES

No. 94.—October Term, 1947.

Memphis Natural Gas Company, Petitioner, v. A. H. Stone, Chairman, State Tax Commission of Mississippi. } On Writ of Certiorari to the Supreme Court of the State of Mississippi.

[June 21, 1948.]

Mr. Justice Frankfurter, with whom The Chief Justice, Mr. Justice Jackson, and Mr. Justice Burton concur, dissenting.

This litigation began before the State Tax Commission of Mississippi by a petition of the Memphis Natural Gas Company for a revision of the franchise tax assessed against that Company under the Franchise Tax Law of Mississippi. On judicial review of this administrative denial, the parties stipulated that "all of the facts stated in said petition are true and no proof of the same shall be required in this cause." [1] The decision therefore must be based on the undisputed allegations of the petition.

Petitioner, a Delaware corporation, owns and operates a pipeline for the transportation of natural gas running from the gas fields in Louisiana through Arkansas and Mississippi into Tennessee. Petitioner has conducted no intrastate business within Mississippi, nor is it qualified to do so. The Company paid Mississippi an income tax "upon that part of its net income fairly attributable to

[1] The second paragraph of the stipulation, in full, is as follows: "That all of the facts stated in said petition are true and no proof of the same shall be required in this cause. The Stipulation that the facts are true shall be limited to the facts stated in the petition and the defendants shall not, by virtue of this Stipulation, be considered or held to have agreed with any of the legal propositions and arguments made by the Memphis Natural Gas Company in said petition as the parties recognize that these legal questions and arguments are for determination by the Court."

activities in Mississippi." It also pays *ad valorem* taxes to the six counties through which the Mississippi portion of its interstate pipeline—some 135 miles—runs. The counties are: Washington, Bolivar, Sunflower, Coahoma, Tunica, and Desoto. It also pays *ad valorem* property taxes to the cities of Greenville (Washington), Indianola (Sunflower), and Clarksdale (Coahoma). In addition to these income and local *ad valorem* property taxes, not here questioned, the State Tax Commission assessed the franchise tax in controversy. This was done under an enactment of 1940, which imposed on all foreign corporations "doing business within this State" [2] a "franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of capital used, invested or employed within this State. . . ." Ch. 115 of the 1940 General Laws of Mississippi § 2; Miss. Code § 9314 (1942). The record is barren of any indication that "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state," *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, other than those for which the State, through its subordinate taxing authorities, has already made exaction, as contrasted with those which are given not by the State but by the United States and for which the State may not make exaction. *Crutcher* v. *Kentucky*, 141 U. S. 47. The record not only makes no such affirmative showing; it denies the foundation for suggesting that the State has given something for which it can exact a return. For it was stipulated between the Company and the State Tax Commission that

> "Your Petitioner obtains no protection from the State of Mississippi and acquires no powers or privileges

[2] The statute defined "doing business" to "mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust." Miss. Code § 9312 (1942).

in its interstate activity other than the protection afforded your Petitioner by virtue of the payment of an ad valorem tax on the property used by the Company wholly in interstate commerce." [3]

Even assuming therefore that, while Mississippi cannot impose a tax for the privilege of doing an exclusively interstate business within the State, it can cast an *ad valorem* property tax on the Mississippi portion of the corpus of its interstate property in a form having all the earmarks of a franchise tax, the assessment here challenged on the record before us cannot stand. And for a very simple reason.

There would hardly be disagreement, I take it, that Alabama could not constitutionally impose an *ad valorem* tax on these 135 miles of pipeline in Mississippi. This is so not because the pipeline does not traverse Alabama—concededly the assailed tax cannot be sustained merely because the pipeline travels through Mississippi—but because Alabama affords nothing to this petitioner for which it could ask recompense by way of a tax. We cannot know, unless we are instructed, how governmental powers are distributed in Mississippi as between its State and local governments. And the petitioner has no proof of its allegations that the nine county and city taxing authorities to which the petitioner pays approximately $85,000 a year in *ad valorem* taxes supply all the benefits which it enjoys from the State and that the State in seeking to enforce the franchise tax against the petitioner

[3] Particularly in the light of the substantial taxes paid by the petitioner for such protection to the nine county and city taxing authorities, where nothing else appears in the record except the exaction, this uncontroverted allegation must control over the presumptive inference that might otherwise be drawn in favor of the validity of the State's exaction. This Court, as the special guardian of the Commerce Clause, ought not to indulge in casuistic assumptions that the allegations left uncontroverted by the State do not correspond to the realities of the Mississippi situation.

is asking something (approximately $3,500 a year) for nothing. But "no proof of the same shall be required in this cause," according to the stipulation between the parties, to which the State Tax Commission has set its name. See *H. Hackfeld & Co.* v. *United States*, 197 U. S. 442, 446. In holding that Mississippi is "exacting compensation under this statute for the protection it affords the activities within its borders" to this petitioner the Court is flying in the face of the record. On the basis of that record Mississippi can no more exact this tax against this pipeline than could Alabama. For we are all agreed that where the only "local incident" is the fact of interstate commerce—that the interstate pipeline goes through Mississippi—the tax is necessarily a tax upon the privilege of doing interstate business. The Commerce Clause put an end to the power of the States to charge for that privilege.

But it is suggested that we are barred from reaching this conclusion, though the record compels it, because it deals with an issue not before us. Let us see. The petition for certiorari presented this question:

> "Admittedly petitioner is engaged in Mississippi solely in interstate commerce. It pays to Mississippi *ad valorem* and income taxes and thus contributes materially to the cost of local government. An undomesticated foreign corporation has the right to engage in Mississippi in interstate commerce without paying for the privilege as the privilege flows from the Commerce Clause of the Federal Constitution and may not be directly burdened by the imposition of a local 'franchise or excise tax.'"

By this statement the petitioner clearly asserted that insofar as Mississippi has power to tax this interstate business for the protection accorded the "local incidents" of that business, the taxes levied by the State through its

local taxing authorities exhausted the power. To tax beyond that is a bald tax on the privilege of doing interstate commerce. If we were precluded from deciding a case only by the precise course of argument presented by counsel, many of our opinions would have to be deleted from the United States Reports.

The Court however attempts to deal with the contention. As I understand the Court's opinion, it argues that even if it be true that this tax does not recompense the State for the local protection accorded the petitioner's activities, this is wholly immaterial as the Supreme Court of Mississippi has given the *tax* a contrary interpretation. The opinion offers the extraordinary suggestion that although the State Tax Commission on behalf of the State conceded that the exaction as a matter of fact afforded no protection, the State Supreme Court may disregard such a concession of fact, having all the force of proof, and hold as a matter of law that protection beyond that for which taxes were already imposed was enjoyed by the interstate business.

In the first place the Supreme Court of Mississippi purported to do no such thing. On the contrary, its opinion concluded as follows:

> "Does the franchise tax here demanded amount to enough to have any substantial effect to block or impede the free flow of commerce, or is it at all out of reasonable proportion to the services and protection which must be furnished by the State in and about the stated local activities? The franchise tax demanded is approximately $3,400 per annum, whereas the ad valorem taxes are approximately $82,000 a year, whence the obvious answer to this last question must be in the negative." (— Miss. —.)

Of course, a State tax on interstate commerce does not become a valid one merely because "it's only a little one." And even in these days, an unconstitutional exaction by a State of $3,400 is not *de minimis*.

But even if the State court's opinion were susceptible of the construction accorded it by this Court, its *ipse dixit* in applying the Commerce Clause, would not be binding on this Court. Of course the construction of a statute is for the State court. But the construction of the statute which this Court now attributes to the State Supreme Court, whereby the tax is imposed not for any "local incidents"—because these have already been fully taxed—makes clear beyond peradventure that it is a tax on the privilege of engaging in the doing of interstate business within the State, and such a tax is, of course, invalid under the Commerce Clause.

It is a novel abdication of this Court's function that we are bound by a State court's views of the constitutional significance of a State tax on interstate business, but are not bound by an unambiguous stipulation by the State that no protection was afforded by the State to the taxable local incidents of the interstate business beyond that for which the State, through its local agencies, has already levied the tax.

A State may of course increase the rate of a properly apportioned ad valorem tax of an interstate business. Compare *Wallace* v. *Hines*, 253 U. S. 66. But it can do so only by increasing the rate. The mere fact that the same number of dollars could have been exacted by the State in a constitutional way cannot legalize every tax, "as though the ad valorem rate had been increased." Because a State could obtain twice the amount of revenue that it gets from an interstate business by increasing the ad valorem rate does not constitutionally justify a tax which, by virtue of a stipulation having the force of

truth, is not referable to any protection which the State accords.

These are not abstract objections against disregarding the tax which the State has in fact levied and treating it as though it levied some other tax. Practical considerations preclude such a patent endeavor to circumvent the restrictions that the Commerce Clause places upon the taxing powers of the States. A State legislature may be ready to levy a tax for the privilege of doing interstate business within the State—as legislatures have again and again attempted to do—and not be prepared to increase outright the ad valorem rate.

The suggestion that an otherwise unconstitutional tax may be treated "as though the ad valorem rate had been increased" is an easy way of sustaining almost every tax that would otherwise fall under the ban of the Commerce Clause by transmuting it into an assumed increase in the rate of an ad valorem tax. The suggestion has the merit of inventiveness. In the competition for revenue among the States, it is an inventiveness that subjects the hitherto great boon of free trade across State lines to the bane of multitudinous local tariffs.

The judgment should be reversed.